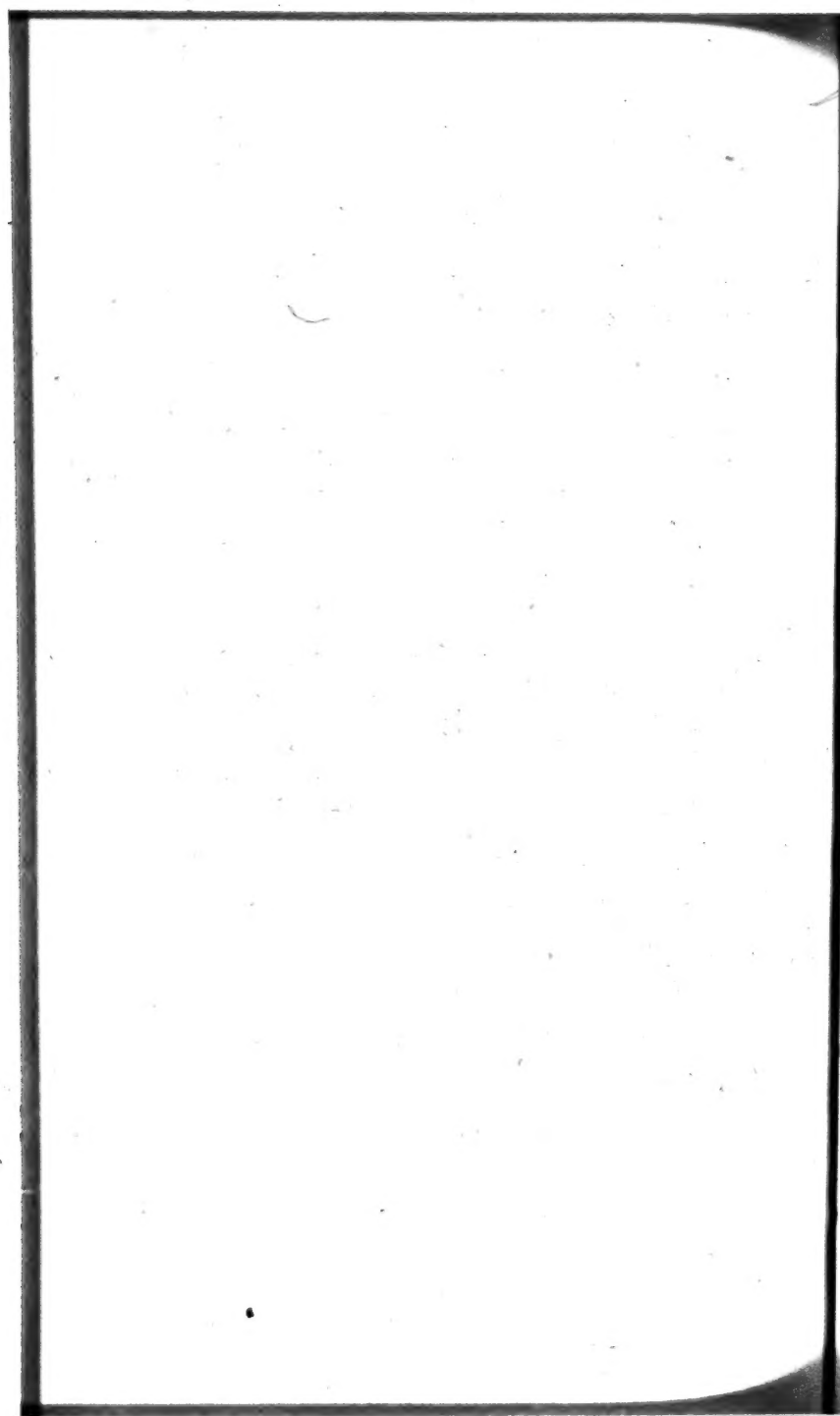


TABLE OF CONTENTS

	Page
LIST OF RELEVANT DOCKET ENTRIES	2
OPINION BELOW	6
Motion for Judgment	7
Demurrer	10
ORDER OVERRUING DEMURRER	11
Answer to Motion for Judgment for Defendant Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO	21
Affirmative Defenses	23
Answer to Motion for Judgment for Defendant Na- tional Association of Letter Carriers, AFL-CIO	24
Affirmative Defenses	25
TRANSCRIPT OF PROCEEDINGS	28
Plaintiffs' Exhibit 2—Carrier's Corner, June, 1970	71
Defendants' Exhibit 3—Constitution of the National Association of Letter Carriers of the United States of America	75
Defendants' Exhibit 4—By-Laws of Old Dominion Branch No. 496 N.A.L.C.	75
Defendants' Exhibit 5—Card Issued by Richmond Labor Council	77
Defendants' Proposed Instructions	79
The Court's Instructions	91
Judgment	96
Notice of Appeal and Assignments of Error	97
Assignments of Error	98



IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL
ASSOCIATION OF LETTER CARRIERS, AFL-CIO

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, *Appellants*,

v.

HENRY M. AUSTIN, L. D. BROWN, AND
ROY ZIEGENGEIST, *Appellees*.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT
OF VIRGINIA

APPENDIX

List of Relevant Docket Entries

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND,
COMMONWEALTH OF VIRGINIA

HENRY M. AUSTIN

vs.

OLD DOMINION BRANCH—496 NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO, ET AL

Name of Paper—Date Filed
 Motion for Judgment—June 24, 1970.
 Proof of Service—June 30, 1970.
 Demurrer—July 15, 1970.
 Demurrer—July 17, 1970.
 Notice—July 22, 1970.
 Court's letter to counsel—December 30, 1970.
 Order—January 21, 1971.
 Court's letter to counsel—January 21, 1971.
 Interrogatories—February 10, 1971.
 Order—February 22, 1971.
 Answers to Interrogatories—March 12, 1971.
 Answer to Motion for Judgment—March 17, 1971.
 Answer to Motion for Judgment—March 17, 1971.
 Supplement to Interrogatories—March 18, 1971.
 Interrogatories—March 25, 1971.
 Interrogatories—June 16, 1971.
 Order—June 10, 1971.
 Interrogatories—June 16, 1971.
 Answers to Interrogatories—June 16, 1971.
 Order—June 29, 1971.
 Copy of order with return—June 29, 1971.

¹ We have been advised by the Clerk of the Supreme Court of Virginia that it does not have a docket as such. We have therefore printed a certified list of the orders entered by that court in these proceedings.

Request under Rule 4:9(b)—April 26, 1971.

Subpoena Duces Tecum

Affidavit—April 23, 1971.

Subpoena Duces Tecum

Order—July 1, 1971

Order—July 2, 1971

Copy of order of 7-2-71

Jury Verdict

Notice—July 7, 1971.

Certificate of Bond—July 27, 1971.

Notice of Appeal and Assignments of Error—August 16, 1971.

Notice—August 18, 1971.

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND,
COMMONWEALTH OF VIRGINIA

L. D. BROWN

vs.

OLD DOMINION BRANCH—496 NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO, ET AL

Name of Paper—Date Filed

Motion for Judgment—July 2, 1970.

Proof of Service—July 28, 1970.

Demurrer—July 28, 1970.

Order—January 21, 1971.

Court's letter to counsel—January 21, 1971.

Interrogatories—February 10, 1971.

Order—February 22, 1971.

Interrogatories—March 10, 1971.

Answer to Motion for Judgment—March 17, 1971.

Answer to Motion for Judgment—March 17, 1971.

Answers to Interrogatories—April 9, 1971.

Order—June 10, 1971.

Notice—June 17, 1971.

Order—July 1, 1971.

Order—July 2, 1971.

Copy of order of 7-2-71

Jury verdict.

Notice—July 7, 1971.

Certificate of Bond—July 27, 1971.

Notice of Appeal and Assignments of Error—August 16, 1971.

Notice—August 18, 1971.

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND,
COMMONWEALTH OF VIRGINIA

ROY P. ZIEGENGEIST

VS.

OLD DOMINION BRANCH—496 NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO, ET AL

Name of Paper—Date Filed

Motion for Judgment—June 24, 1970.

Proof of Service—June 30, 1970.

Demurrer—July 15, 1970.

Demurrer—July 17, 1970.

Notice—July 20, 1970.

Order—January 21, 1971.

Court's Letter to Counsel—January 21, 1971.

Order—February 3, 1971.

Interrogatories—February 10, 1971.

Order—February 16, 1971.

Answer to Interrogatories—February 19, 1971.

Interrogatories—February 22, 1971.

Answers to Interrogatories—March 8, 1971.

Answer to Motion for Judgment—March 17, 1971.
 Answer to Motion for Judgment—March 17, 1971.
 Order—June 3, 1971.
 Order—June 10, 1971.
 Request for Admissions—June 14, 1971.
 Interrogatories—June 16, 1971.
 Answer to Request for Admissions—June 17, 1971.
 Answers to Interrogatories—June 24, 1971.
 Order—July 1, 1971.
 Order—July 2, 1971.
 Copy of order of 7-2-71.
 Instructions Given.
 Instructions Refused.
JURY VERDICT.
 Notice—July 7, 1971.
 Certificate of Bond—July 27, 1971.
 Notice of Appeal and Assignments of Error—August 16,
 1971.
 Notice—August 18, 1971.

IN THE
 SUPREME COURT OF VIRGINIA

Record No. 7917

Old Dominion Branch No. 496, National Association of
 Letter Carriers, AFL-CIO, *Plaintiffs in error,*
 against

HENRY M. AUSTIN, *Defendant in error.*

Order granting writ of error and supersedeas—entered
 January 12, 1972.
 Mandate—entered November 27, 1972.
 Order staying execution of judgment—entered December
 22, 1972.

IN THE
SUPREME COURT OF VIRGINIA

Record No. 7918

Old Dominion Branch No. 496, National Association of
Letter Carriers, AFL-CIO, et al., *Plaintiffs in error*,
against

L. D. BROWN, *Defendant in error*.

Order granting writ of error and supersedeas—entered
January 12, 1972.

Mandate—entered November 27, 1972.

Order staying execution of judgment—entered December
22, 1972.

IN THE
SUPREME COURT OF VIRGINIA

Record No. 7919

Old Dominion Branch No. 496, National Association of
Letter Carriers, AFL-CIO, et al., *Plaintiffs in error*,
against

ROY P. ZIEGENGEIST, *Defendant in error*.

Order granting writ of error and supersedeas—entered
January 12, 1972.

Mandate—entered November 27, 1972.

Order staying execution of judgment—entered December
22, 1972.

Opinion Below

The opinion of the Supreme Court of the State of
Virginia in these proceedings is reproduced as an Appen-
dix to the Jurisdictional Statement at pp. 1a-11a.

NOTE: THE MOTIONS FOR JUDGMENT IN ALL THREE CASES
WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED
BELOW.

[Caption omitted in printing]

Motion for Judgment

The plaintiff, Roy P. Ziegengeist, moves the Court for a judgment against the defendants, Old Dominion Branch #496, National Association of Letter Carriers AFL-CIO and The National Association of Letter Carriers, for the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), to wit: FIFTY THOUSAND DOLLARS (\$50,000.00) as compensatory damages and FIFTY THOUSAND DOLLARS (\$50,000.00) as punitive damages for the following:

1. That on or about June 5, 1970 and prior thereto the defendant was an unincorporated association, Old Dominion Branch #496, National Association of Letter Carriers AFL-CIO, being associated as a labor union with the defendant, National Association of Letter Carriers, affiliated with the AFL-CIO and having as its membership letter carriers of the United States Postal Service in the Richmond, Virginia area, the AFL-CIO being a national labor organization of which the defendant, Old Dominion Branch #496, was a part.

2. That on the date aforesaid and prior thereto said defendant, Old Dominion Branch #496, National Association of Letter Carriers AFL-CIO, had organized the letter carriers in the Richmond, Virginia area and was the bargaining agent for said carriers and that said defendant was actively promoting said union activities and soliciting and attempting to compel all letter carriers to affiliate with the defendant's union.

3. That the plaintiff, Roy P. Ziegengeist, had exercised his right as an employee of the United States Government Postal Service not to affiliate with or become a part of said defendant's union.

4. That the defendant, Old Dominion Branch #496, with the knowledge and consent of the defendant, the National Association of Letter Carriers, did act maliciously and with

the intent by unlawful means, coercion and activity to compel the plaintiff to become a part of said union and intending maliciously to harm and injure the plaintiff in his good name and reputation for his refusal and to force and compel him to join said defendant union in violation of his rights as an American citizen and as an employee of the United States Government and embarked on a deliberate scheme and plan to defame the plaintiff in his good name and reputation and to hold him up to public ridicule as a means of accomplishing its illegal and unlawful purpose.

5. That on or about said June 5, 1970, the said defendants maliciously, recklessly and wickedly in furtherance of their unlawful purpose and scheme to compel the plaintiff, Roy P. Ziegengeist, to join their union published and distributed in the union newspaper and newsletter and distributed the same through the United States Mail to all union members slanderous and libel statements concerning the plaintiff, to-wit:

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab.

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of Hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

"LIST OF SCABS

Henry Austin
Lewis Bolton
E. D. Brown
L. D. Brown
R. L. Broughman
R. L. France
Roger Hanson
Randolph Jacobs

Richard Leonard
F. E. Moriconi
Judson Proctor
Wilford Tevis
Hunter Whitlock
R. L. Worsham
R. P. Ziegegeist"

6. That the aforesaid statements published of and concerning the plaintiff are slanderous and insulting and were falsely and maliciously made and were published by the defendants as aforesaid and said words and accusations were per se slanderous and libelous to the damage of the plaintiff and were words which from their usual construction and common acceptation are construed as insulting and tending to violence and breach of the peace.

7. As a result of the aforementioned illegal, malicious, insulting, wicked, defamatory and slanderous statements as aforesaid published by the defendants, acting through their duly authorized agents, servants and employees, the said defendants have caused the said plaintiff, Roy P. Ziegegeist, to suffer humiliation, mortification, shame, vilification and exposure to public infamy and scandal, injury to his reputation and feelings and harm in his job and employ-

ment and financial loss, which injuries will so continue permanently.

WHEREFORE, the plaintiff demands judgment against the aforesaid defendants and each of them in the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), namely, FIFTY THOUSAND DOLLARS (\$50,000.00) as compensatory damages and FIFTY THOUSAND DOLLARS (\$50,000.00) for punitive damages, as well as court costs.

ROY P. ZIEGENGEIST
By /s/ Stephen M. Kapral
Counsel

/s/ Stephen M. Kapral
DEAL AND KAPRAL
4510 South Laburnum Avenue
Richmond, Virginia 23231

NOTE: THE DEMURRERS IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Demurrer

COMES the Defendant, The National Association of Letter Carriers, demurring to the Motion for Judgment filed herein, and says that said Motion for Judgment is not sufficient in law.

THE NATIONAL ASSOCIATION OF
LETTER CARRIERS

By /s/ Israel Steingold
819 Citizens Bank Building
Norfolk, Virginia 23514

and
Mozart G. Ratner
818 - 18th Street, N.W.
Washington, D.C.

Order Overruling Demurrer

LAW AND EQUITY COURT OF THE CITY OF RICHMOND

Richmond, Virginia

23219

Judges

Robert Lewis Young
Alex H. Sands, Jr.
A. Christian Compton

Clerk

Luther Libby, Jr.

January 21, 1971

Parker E. Cherry, Esquire
1012 Mutual Building
Richmond, Virginia

Stephen M. Kapral, Esquire
Deal and Kapral
4510 South Laburnum Avenue
Richmond, Virginia 23231

Israel Steingold, Esquire
Steingold, Steingold & Chovitz
819 Citizens Bank Building
Norfolk, Virginia 23514

Mozart G. Ratner, Esquire
818 - 18th Street, N.W.
Washington, D.C.

Gentlemen:

Enclosed you will find a copy of each order entered today in each of the above three cases overruling the demurrers filed therein. Each order sets the time within which the defendants shall file their grounds of defense.

Since the case is before the Court upon demurrer, the manner in which the Court must consider the allegations of

the Motion for Judgment upon the demurrer should be reviewed. The rule is fully stated in *Ames v. American National Bank*, 163 Va. 1 (1934), at pages 37 and 38 as follows:

"A demurrer admits that all material facts which are well pleaded are true. Facts well pleaded, and therefore admitted, are (a) facts expressly alleged, (2) facts which are by fair intendment impliedly alleged, and (3) facts which may be fairly and justly inferred from the facts alleged. Facts sufficiently alleged must be taken as true (unless they are inherently impossible, or contradicted by other facts pleaded) even though the court may be of opinion that it is improbable that they are true. And all reasonable inferences of fact which a trier of facts may fairly and justly draw from the facts alleged must be considered by the court in aid of the pleading. But the demurrer does not admit the correctness of the conclusions of law stated by the pleader, or that the inferences of fact drawn by the pleader from facts alleged may be fairly and justly drawn therefrom."

The respective plaintiffs here allege that on or about June 5, 1970 the defendant local, a branch of the defendant national association, had as its membership letter carriers of the United States Postal Service in the Richmond area; had organized the letter carriers in the Richmond area; and, were the bargaining agents for said carriers. It is further alleged that said defendants were actively promoting union activity and soliciting and attempting to compel all letter carriers to associate with the defendant organizations; that each plaintiff had chosen not to affiliate with the union; that the defendants, acting maliciously and with intent to harm and injure the plaintiff in his good name and reputation, embarked on a deliberate scheme and plan to defame the plaintiff and to hold him up to ridicule by his

fellow employees and by the public, caused to be published on or about June 5, 1970 in a union newspaper or newsletter defamatory and insulting statements concerning the plaintiff, specifically naming and identifying him.

It is further alleged that the defamatory statement which purports to define a "scab," was maliciously made and caused the plaintiff injuries and damages. In each case the plaintiff seeks recovery in compensatory and punitive damages.

The defendants demur on two main grounds. First, they assert that the publication complained of is protected against a state court action for damages by the freedom of speech guarantee of the First Amendment to the Constitution of the United States as incorporated in the due process clause of the Fourteenth Amendment; and, second, the publication complained of is protected against a state court suit for damages by Executive Order 11491, effective January 1, 1970. 3 C.F.R. 191 (1969).

At the outset it should be noted that the Court is treating each of these actions as being brought under the Virginia statute for insulting words (Code § 8-630, Code of Virginia of 1950, as amended) and not as a blend of the common law action for libel and of the statutory action for insulting words, since it is a well-settled principle of law that such actions cannot be properly joined in the same count of a Motion for Judgment. *Sun Life Assurance Co. v. Bailey*, 101 Va. 443, 446 (1903); *Payne v. Taneil*, 98 Va. 262, 266 (1900); Burks Pleading and Practice, Section 165 pp. 270, 271 (4th Ed.); 12 M.J., *Libel and Slander*, § 39, page 43, ftns. 1 and 2. Furthermore, since it appears that the Motions for Judgment herein are intended to be brought under the statute for insulting words, the pleadings are not defective because a publication containing insulting words may be declared on under the statute, although libelous at common law. *Ibid.*

The Virginia statute for insulting words reads as follows:

"All words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace shall be actionable."

Prior to 1940, the aforesaid statute contained this additional sentence: "No demurrer shall preclude a jury from passing thereon." By amendment in that year the demurrer prohibition was eliminated and now the court has the same power over the statutory action as it enjoyed over common law actions for libel and slander. This being the case, a brief review of the nature of the statutory action under Virginia law is in order. Thereafter the effect, if any, of the federal law upon the state law will be considered.

In *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1 (1954), it is stated at page 6 as follows:

"An action for insulting words under Code, § 8-630 is treated precisely as an action for slander or libel, for words actionable *per se*, with one exception, namely, no publication is necessary. The trial of an action for insulting words is completely assimilated to the common law action for libel or slander. *Darnell v. Davis*, 190 Va. 701, 58 S.E. (2d) 68; *W. T. Grant Co. v. Owens*, 149 Va. 906, 141 S.E. 860; *Guide Pub. Co. v. Futrell*, 175 Va. 77, 7 S.E. (2d) 133. . . .

"At common law defamatory words which are actionable *per se* are: (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, which if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment.

(4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damage are actionable. . . .

"(2) Although varying circumstances often make it difficult to determine whether particular language is defamatory, it is a general rule that allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used. In order to render words defamatory and actionable it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication or insinuation. *James v. Powell*, 154 Va. 96, 152 S.E. 539; *Moss v. Harwood*, 102 Va. 386, 46 S.E. 385; 53 C.J. S. §§ 9, 10, pp. 46, 47."

See also 50 Am. Jur. 2d *Libel and Slander*, § 20, p. 532.

The Court must determine, considering the allegations made in the respective motions for judgment under the rules applicable to a demurrer, whether the words in question could be considered and construed by fair-minded men as insulting and tending to violence and breach of the peace. If they can be so reasonably construed, then they are actionable under the statute unless the occasion was one of privilege. *Darnell v. Davis*, 190 Va. 701, 706 (1950). See also 45 Va. L. Rev. 772, 774.

The words in question which are specifically directed to each plaintiff are insulting and tend to violence and breach of the peace. It would serve no purpose here to take each sentence of the statement and point out the actionable language therein. Suffice it to say, that the entire "definition"

of a "scab" is actionable under the Virginia statute for insulting words.

It having been determined that the statement is actionable, the question of privilege should be considered.

In 12 M. J. *Libel and Slander*, page 59, *et seq.*, the following instructive discussion of privilege is found:

"Privileged communications are of two kinds, those absolutely privileged and those qualifiedly privileged. Defamatory words cannot constitute a privileged communication or publication unless the occasion upon which they are used is either absolutely or qualifiedly privileged. A 'privileged communication' or statement, in the law of libel and slander, is one which, except for the occasion on which or the circumstances under which it is made, would be defamatory and actionable. A privileged occasion, as used in cases of defamation, strictly speaking, is confined to an occasion in which the party using the language of which complaint is made had communicated the same to another party to whom he owes a duty. That is, the occasion is such that one or more members of the public are clothed with greater immunity than others. And one is not liable in damages for privileged communications, where the use of the privileged occasion is bona fide.

"The rule as to privileged communications applies as well to actions under the statute of insulting words as to common-law actions of libel and slander.

"The test to be applied upon a plea of privilege is the relevancy and pertinency of the alleged offending language to the matter in inquiry, whether an action for the recovery of damages is brought upon a charge of slander or upon a charge of libel.

"... Absolute privilege relates to proceedings of legislative bodies, judicial proceedings, military and naval officers, and other acts of the government itself.

• • • • •

"... The proper meaning of a qualified privilege is only this: That the occasion, on which a communication is made, refutes the inference *prima facie*, arising from a statement prejudicial to the character of the plaintiff, and puts the onus upon the plaintiff to prove actual malice or malice in fact. Qualified privilege, as that term is used in the law of libel, carries with it the suggestion that the publication is objectionable in certain circumstances, and would be actionable but for the peculiar conditions under which it was made. In order for a plea of qualified privilege to be good, it must show that the defendant published the alleged libel believing it to be true, and to persons to whom he either owed a duty, or who were jointly interested with him in the matter sought to be protected by the publication. A defendant cannot claim that a libel published promiscuously to all persons is privileged, unless he owed a duty to the general public which he sought to perform by the publication. If the occasion is only qualifiedly privileged, three things must concur to render the communications or publication privileged (that is, to establish the defense of privilege): (1) the occasion upon which the words are used must be privileged; (2) the words used must not transcend the scope of the privilege of the occasion; and (3) the words must be used in good faith, without actual malice. The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only."

See also *Elder v. Holland*, 208 Va. 15 (1967), and *Story v. Newspapers, Inc.*, 202 Va. 588 (1961).

It is generally recognized that a qualified privilege attaches to statements and communications made in connection with the various activities of labor unions so long as

they act without malice and are not actuated by improper motives. 50 Am. Jur. 2d *Libel and Slander*, § 206, page 715. Upon the trial of these cases, it may develop that the facts will support a defense of qualified privilege in which case the burden will be upon the plaintiff to prove that the defendants have abused the privilege. That burden will require the plaintiff, of course, to prove that the defendants published the objectionable matter with actual malice or that the scope of the privilege was exceeded in some other manner such as by use of language disproportionate to the occasion. 45 Va. L. Rev. at 781 and 782. See also *R. H. Bouligny, Inc. v. United Steelworkers of America* (N.C. 1967), 154 S.E.2d 344; 150 A.L.R. 932, supplemented in 19 A.L.R.2d 694. Even assuming that these motions for judgment state facts which show the existence of a conditional privilege, nevertheless, the pleadings sufficiently allege an abuse of that privilege.

Now, considering the allegations in the pleadings in the light of the state law on the subject, the impact of the federal law must be evaluated. Under the facts alleged, the federal cases have no real effect upon our state law on the subject. The Supreme Court of the United States has clearly held that state remedies may be applied where a party to a labor dispute circulates false and defamatory statements during a union organizing campaign upon allegation and proof that the statements were made with malice and resulted in damage of the plaintiff. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). Such availability of state remedies is restricted "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 15 L. Ed. 2d 591. Such damages "may include injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law." *Ibid.* This is but another way of saying under Virginia law that if a qualified privilege exists

here, the plaintiff must prove abuse of that privilege. *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 at page 1435 (1964). See also Currier, Defamation in Labor Disputes: Preemption and The New Federal Common Law, 53 Va. L. Rev. 1 (1967).

The defendants recognize the above-stated application of the federal law in state courts, but in taking the position that the statement in question is not actionable, they argue that the words are mere vituperation and hyperbole which are common parlance in labor disputes; and, that such comments are mere expressions of opinion rather than misrepresentations of fact. Neither position is well taken upon demurrer. Accusing the plaintiffs of having "rotten principles," of lacking "character," and of committing the crime of treason (Code, Section 18.1-418) may be construed as statements of fact which from their usual construction and common acceptance in the circumstances under which they are uttered are susceptible of being defamatory. Whether they are in fact actionable will depend upon the evidence. *Zayre, Inc. v. Gowdy*, 207 Va. 47, 50 (1966); Restatement of Torts, Section 563, comment 3. The case of *Greenbelt Coop. Pub. Assoc. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90, S. Ct. ____ (1970), relied upon by the defendants, is not authority for a contrary conclusion. There is a vast difference between the use of "blackmail" in describing Bresler's activities there and the use of the words in question directed to these plaintiffs under the circumstances alleged. Unless the meaning intended is free from doubt, it is for the jury and not the Court to determine the construction of the alleged defamatory language.

The defendants also argue that the motions for judgment are fatally defective for several reasons, the first being that certain specific details of fact are omitted. As previously stated, the allegations are sufficient to state a cause of action in each case under the Virginia statute. If the defendants feel the pleadings are incomplete and fail to fairly inform

them of the true nature of the claim, the defendants' relief is by motion for a bill of particulars and not by demurrer. Rule 3:18(d).

Next, the defendants argue that there must be "proof that the words had a defamatory meaning" citing *Linn*. The Court agrees with that position and has held that the pleadings furnish a sufficient basis for such proof.

Finally, the defendants argue these words which do not tend to *immediate* violence and which do not raise a "clear and present danger" to breach of the peace are constitutionally protected. The cases relied upon by the defendants fail to support that proposition as applied to the words in question here. See particularly *Youngdahl v. Rainfair*, 355 U.S. 131, 2 L. Ed. 2d 151, 156, 78 S. Ct. 206 (1957), involving the use of "scab" by strikers.

In summary, the Court holds that these motions for judgment are sufficient in law even considering the impact of the federal law upon the law of this state on this subject. However, it should be stated also that while the law of Virginia applies to publications of a labor union which are relevant to and in the course of a campaign to organize federal employees, nevertheless the union (depending, of course, upon the evidence) is usually afforded the protection of a qualified privilege. Therefore, the ultimate burden upon these plaintiffs will probably be to prove that the statement in question was uttered with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

For these reasons, the demurrers are overruled.

Very truly yours,

/s/ A. CHRISTIAN COMPTON, Judge

ACC/jat
Enclosure

NOTE: THE ANSWERS FILED BY OLD DOMINION BRANCH 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Answer to Motion for Judgment for Defendant Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO

Comes now the defendant, Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO, and, in answer to the Motion for Judgment states as follows:

1. Admits that National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "NALC") is a national labor organization; that defendant Old Dominion Branch 496 (hereinafter referred to as Branch 496) is a branch of NALC; and that Branch 496 admits to membership letter carriers in the Richmond area. Further answering, defendant Branch 496 asserts that it is an autonomous local labor organization, which conducts its own affairs through its own officers, elected by its own membership, and that its affairs are governed by its own independent Constitution and Bylaws, and resolutions, customs and practices pursuant thereto. The Secretary of Branch 496 writes, edits and publishes the Branch's own newsletter, without any authorization, direction, consultation, supervision or participation therein by NALC or any officer or agent thereof.

2. Admits that on the dates mentioned, and at all relevant times, a majority of the letter carriers in the Richmond area were members of Branch 496 and that defendants NALC and Branch 496 were and are the exclusive bargaining agents of all letter carriers in the aforesaid area. Admits that at all relevant times defendants were actively engaged in representing all letter carriers in the Richmond area, non-members as well as members of Branch 496, in

collective bargaining, grievance adjustment, adverse actions, and other matters affecting wages, hours and working conditions *vis-a-vis* their employer, the Post Office Department, as they were required to do by federal law. Admits that defendant Branch 496 was, at all relevant times, and still is, "soliciting" all letter carriers in its territorial jurisdiction to join or affiliate with Branch 496, but denies that defendant NALC, or any of its officers or agents, were or are engaged in such solicitation. Denies that defendant Branch 496 or defendant NALC was or is "attempting to compel," any letter carrier to affiliate, and affirmatively alleges that defendant Branch 496 was and is exercising its constitutional and federal legal rights to persuade non-members to join.

3. Admitted.

4. Denied.

5. Defendant states that Angelo Parker, Secretary of defendant Branch 496, caused to be printed in the Branch 496 newsletter the article which plaintiff claims is defamatory; that the entire text of said article is a world renowned literary classic written long ago by the famous American novelist, Jack London, now deceased; and that said article has been reprinted thousands of times by countless labor organizations, with reference to persons eligible for union membership who refuse to join the organization or who otherwise participate in activity deemed detrimental to its interests or the interests of its membership as a whole, or of its constituency. Defendant Branch 496 further states that Mr. Parker considered the article complained of applicable to plaintiff and to the other non-members of Branch 496 whose names appear below the article because of their deliberate, wilful and malicious refusal to join and become or remain members of Branch 496, which refusal, in his opinion, was designed to and did enable them unjustly to profit at the expense of Branch 496 and which, in his opinion, imposed and imposes undue and unequitable finan-

cial and other burdens on the membership of Branch 496. Defendant denies that said article was published with the knowledge and consent of defendant NALC, and in all other respects, the allegations are denied.

6. Denied.

7. Denied.

Affirmative Defenses

Further answering, Branch 496 asserts that this Honorable Court lacks jurisdiction of the subject matter of this action because:

1. The publication complained of is protected against plaintiff's damage suit by the Fourteenth Amendment of the Constitution of the United States, insofar as said amendment incorporates and absorbs the freedom of press guarantee of the First Amendment.

2. The aforesaid publication is protected against plaintiff's damage suit by the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, which is applicable thereto by virtue of Executive Order 11491, October 29, 1969, 34 F.R. 17605.

3. The Virginia Statute for insulting words, Code § 8-630, Code of Virginia of 1950, as amended, pursuant to which, it has been held, this complaint is brought, is unconstitutional both on its face and as construed and applied to the complaint herein in the letter opinion of the court dated January 21, 1971:

(a) Said statute is void because it forbids publication of constitutionally protected words and utterances; because it is overbroad and unduly vague; and because it exerts a chilling effect upon freedom of speech and of the press, all in violation of the due process clause and freedom of speech and press guarantees of the Fourteenth Amendment; and

(b) Said statute encroaches severely upon freedom of speech and of the press in labor disputes, in violation of

the Fourteenth Amendment, of Executive Order 11491, and of the Supremacy Clause.

4. If, contrary to the aforesaid defenses, the aforesaid publication is in fact and in law not constitutionally protected and is subject to a state court suit for damages, defendant Branch 496 is not liable therefore because it did not actually authorize, participate in or ratify publication of this or any other article which was, or should have been, known to contain falsehoods or unlawful words.

Respectfully submitted,

ISRAEL STEINGOLD

819 Citizens Bank Building
Norfolk, Virginia 23514

MOZART G. RATNER

818 - 18th Street, N.W.
Washington, D.C. 20006

March 15, 1971

NOTE: THE ANSWERS FILED BY NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Answer to Motion for Judgment for Defendant National Association of Letter Carriers. AFL-CIO

Comes now the defendant, National Association of Letter Carriers, AFL-CIO, and, in answer to the Motion For Judgment states as follows:

1. National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "NALC") admits that it is a national labor organization. Old Dominion Branch 496, National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Branch 496") is an autonomous local labor organization affiliated with the National Association, which admits to membership letter carriers in the area of Richmond, Virginia. Branch 496 conducts its own affairs through its own officers, duly elected by its own membership, and pursuant to its own Constitution and Bylaws, and resolutions, customs and practices enacted or adopted pursuant thereto. NALC exercises no authority over the internal affairs of Branch 496 except to the extent described in the Constitution and Bylaws of NALC.

2. Denied.

3. Admitted.

4. Denied.

5. Denied. Further answering, defendant NALC states that neither it, nor any of its officers or agents, directly or indirectly, authorized, was consulted about, or in any way participated in or ratified, the publication complained of.

6. Denied.

7. Denied.

Affirmative Defenses

Further answering, NALC asserts that this Honorable Court lacks jurisdiction of the subject matter of the action because:

1. The publication complained of is protected against plaintiff's damage suit by the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, which is applicable hereto by virtue of Executive Order 11491, October 29, 1969, 34 F.R. 17605.

3. The Virginia Statute for insulting words, Code § 8-630, Code of Virginia of 1950, as amended, pursuant to which, it has been held, this complaint is brought, is unconstitutional both on its face and as construed and applied to the complaint herein in the letter opinion of the Court dated January 21, 1971:

a. Said statute is void because it forbids publication of constitutionally protected words and utterances; because it is overbroad and unduly vague; and because it exerts a chilling effect upon freedom of speech and of the press, all in violation of the due process clause and freedom of speech and press guarantees of the Fourteenth Amendment;

b. Said statute encroaches severely upon freedom of speech and of the press in labor disputes, in violation of the Fourteenth Amendment, of Executive Order 11491, and of the Supremacy Clause.

4. If, contrary to the aforesaid defenses, the aforesaid publication is in fact and in law not constitutionally protected and is subject to a state court suit for damages, defendant NALC is not liable therefore because it did not ac-

tually authorize, participate in or ratify publication of this or any other article which was, or should have been, known to contain falsehoods or unlawful words.

Respectfully submitted,

ISRAEL STEINGOLD

819 Citizens Bank Building
Norfolk, Virginia 23514

MOZART G. RATNER

818 - 18th Street, N.W.
Washington, D.C. 20006

March 15, 1971

Transcript of Proceedings

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND
VIRGINIA:

HENRY M. AUSTIN, L. D. BROWN, ROY P. ZIEGENGEIST

v.

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO, an Unincorporated Association,
and

THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

TRANSCRIPT of the evidence and other incidents of the
above when heard on July 1 and 2, 1971, before Honorable
A. Christian Compton, Judge, and a jury.

• • • • •
[38] JOHN OVERBY, JR., called at the instance of counsel
for the plaintiffs, first being duly sworn, testified as fol-
lows:

DIRECT EXAMINATION

BY MR. CHERRY:

Q. Will you state your name, residence and occupation.
A. John Overby, Jr. I live at 1607 Pulliam Road, Bon Air,
and operate the Ben Franklin Printing Company.

Q. As the Ben Franklin Printing Company, do you pub-
lish the Carrier's Corner for the Local Union here, Postal
Union? A. Yes, sir, I do.

• • • • •
[45] CROSS EXAMINATION

BY MR. RATNER:

• • • • •
[47]Q. To whom do you send the bill for printing Car-
rier's Corner? A. The bill is sent to Old Dominion Branch
No. 496.

Q. Have you ever sent a bill to the National Association of Letter Carriers in Washington, D.C.? [48] A. I don't recollect having sent a bill there, no, sir.

Q. Has any officer, agent, or person identifying himself as an officer or agent of the National Association of Letter Carriers in Washington, D.C. ever authorized you or instructed you to print Carrier's Corner? A. Not to my knowledge, no, sir. No one of the Washington Region.

Q. Were you ever instructed to send a copy of any proofs to Washington or to any officer of the National Association of Letter Carriers before printing Carrier's Corner? A. No, sir.

Q. Did, in fact, you ever do so? A. No, sir.

Q. How many copies of Carrier's Corner do you print each month? A. 575 copies.

Q. Did you print any more copies of any particular issue between January, 1970 through September, 1970, than you did at any other time? A. No, sir.

Q. The same number of copies? A. Yes, sir.

• • • • •

[49] REDIRECT EXAMINATION

By MR. CHERRY:

Q. Mr. Overby, will you look at the face of Carrier's Corner. Look on your left-hand side there, at the seal there. Whose seal is that on there? A. This one on the left on the front, sir?

Q. Yes. A. The National Association of Letter Carriers.

Q. So it is published with the seal of the National Association of Letter Carriers? A. That is correct.

• • • • •

[50]JOHN W. NETHERLAND, called at the instance of counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHERRY:

Q. Mr. Netherland, what is your name and occupation? A. John W. Netherland, Director of Operations for the Richmond Post Office.

Q. Now did you last—or the early part of last summer or spring have occasion to discuss some publication with any of the carriers? A. Yes, sir.

Q. Who was that carrier? A. His name was Austin.

Q. What was the circumstances under which you discussed it? A. He approached me with a copy of the pamphlet or bulletin or whatever you might call it, journal, and he objected to an article that appeared in there using his name. The name appeared in the article.

Q. Did you go to the Postmaster? A. He came to me with a complaint about it [51] and I advised him that it was a matter beyond my responsibility and something which concerned he and his organization and that I would take no action, and I advised him to see the postmaster.

Q. That was your extent of it. He registered a complaint with you? A. Right.

• • • • •

[52]LAWRENCE HUTCHINS, called an adverse witness by counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

Q. You are Wayne Hutchins? A. Lawrence Hutchins.

Q. Lawrence Hutchins. I direct your attention back to the time of June, 1970, when this alleged article was printed, what was your position with the Local No. 496 Branch of the Letter Carriers at the time the article was

published? A. At the time the article mentioned by you was printed I was President of the Local Branch No. 496.

Q. Is it not true that the Local Branch No. 496 is affiliated with the National Association of Letter Carriers AFL-CIO? A. Local Branch No. 496 is affiliated with the National Association of Letter Carriers AFL-CIO as the National Association constitution calls for affiliation, and in that regard we are.

[53] BY MR. KAPRAL: (Continuing)

Q. Mr. Hutchins, what benefits do Local No. 496 derive from the National Association of Letter Carriers? [54] A. Local No. 496 derives such benefits as representation in the Halls of Congress through a lobbying procedure and dissemination of information gained by the National Office through their travel and through their training, through oral and written communications.

Q. That is the only benefits that are received? A. As I can really recall.

Q. Now being a member of the Local Branch No. 496 of the National Association of Letter Carriers, is it not true that dues are collected by the Local Branch each pay period? A. No, sir, that is not true.

Q. Are dues collected? A. Yes, sir, through a payroll deduction system.

Q. How often? A. Every month.

Q. Once a month? A. Yes, sir.

Q. You were President of the Local Branch No. 496 in June, 1970. Answer me this question. These dues collected each month, how much of these dues are sent to the National Association in Washington?

MR. RATNER: Your Honor, I object. The [55] relationship between the dues, the part retained or refunded by the National Association to each Local, is definitely set out in the constitution of the National Association of Letter Carriers and governed thereby.

THE COURT: Is there any dispute to that fact?

MR. RATNER: None whatsoever. The fact is clear.

THE COURT: Well then what is the harm of having this witness testify, or you stating what the constitution provides, if that fact is desired to be brought to the jury?

MR. RATNER: I withdraw the objection.

BY MR. KAPRAL: (Continuing)

Q. I believe you stated, Mr. Hutchins, that each month dues are collected here in the Local Old Dominion Branch No. 496 from each member? **A.** No, sir.

Q. On a payroll deduction? **A.** Right.

Q. I am asking you this question in addition, each month from this payroll deduction from each member, the amount of money taken in payroll deduction from each member, the amount of money taken in payroll deduction for [56] dues, how much is allocated to the National Association of Letter Carriers in Washington, D.C.? **A.** The money is deducted from the Union membership when the checks are made, which is in the Data Center, Atlanta, Georgia. They collect the amount of money from the Union membership dues and send the remittance to the National Association in Washington, and they in turn deduct their portion of the dues and remit to us the remaining balance.

Q. Your answer is that a certain amount is allocated each month to the National in Washington, D.C. Is that your answer? **A.** Yes.

Q. Now let me ask you something, Mr. Hutchins, when a member here in Virginia joins Local No. 496 of the National Association of Letter Carriers then he automatically becomes a member of the National Association of Letter Carriers? **A.** Not all the time. There is a process that has to take place which puts him on the roles.

Q. Would you explain that? **A.** The Local secretary has to complete a form. The form is submitted to Washington and based upon a dues structure, if his dues are paid six months, then he is a qualified member of the National Association of Letter [57] Carriers.

Q. Didn't you say before that dues are taken from the payroll all the time? A. First his name has to be submitted to the Data Center and then as the process evolves the National retains its portion, after the Local has sent proper notification to the National.

Q. Are you still President? A. Yes.

Q. Being President, you should be able to answer this. Do you know of any case here at the Local level, Old Dominion Branch, where a person who became a member of Local No. 496 was not admitted to the National Association? A. No, I don't.

Q. You don't know of any case like that? A. No.

Q. Once you join the Local Branch, No. 496, and this six months period as you mentioned, or trial period passes and you are admitted to the National Association of Letter Carriers, what type card do you receive? A. You receive a card from the Local Branch secretary with the following, To Whom It May Concern he is a member of the National Association of Letter Carriers, and the Local Branch stipulated in the provided case.

[58]Q. Do you have your card with you today, sir? A. I may have.

Q. Would you produce the card? A. If I have it I will be glad to. [Looking through wallet] Here it is.

Q. You know Mr. Ziegengeist. To to the best of your knowledge has anyone in your Union, member or officer, ever apologized to any one of these three gentlemen and told them they were sorry for what was published or said about them? [59]A. The best I can answer, no.

Q. Now you are President of the Union. Have you ever apologized to any one of these gentlemen? A. For what?

Q. This alleged libelous article, these things written about these gentlemen? A. No, sir, I have not.

[62]Q. Referring your attention back again to the article printed in June, 1970, did you know at this time that this

article was going to be printed about these gentlemen? A. Did I know that the article was going—

Q. Did you know that this article was going to appear in the June 1970 issue? A. Yes.

Q. You knew that? A. Yes.

Q. Do you know yourself that Mr. Henry Austin and Mr. Brown and Mr. Ziegengeist, do you know that all three of them or any one of them have rotten principles? A. I do not know the individuals to that extent to really describe their principles.

Q. In other words, you don't know that they have or have not got rotten principles? A. No.

• • • • •

[63] BY MR. KAPRAL: (Continuing)

Q. Do you think, Mr. Hutchins, that any one of these gentlemen seated here, the plaintiffs in this case, or all of them, are traitors to their country? A. The material written was written because of the feeling that we as Union officials had toward these individuals who we knew were prospering by the sweat of our brow. They are gaining without really contributing anything. It was just a matter of a figure of speech, to say like the cow jumped over the moon, which I know is not physically possible. So it was just a figure of speech as [64]such.

Q. Was it a figure of speech of any one of these gentlemen, or all three of them, that they were traitors to their families or wives? A. We used the whole statement as a figure of speech, something to express our emotions with. It was just a metaphor or something that you would use like the rat ate all the cheese out of the warehouse, or something of this nature.

Q. Then you are saying, or what you are really saying is you can't say one way or the other whether these gentlemen are guilty of being traitors or have rotten principles or anything that was written in the article, one way or

the other? A. No, I can't say as a matter of fact that they—we just used these statements as a figure of speech.

• • • • •

[71] REDIRECT EXAMINATION

By MR. KAPRAL:

Q. Mr. Hutchins, was this article written and composed and printed in this publication to coerce these gentlemen here to join your Union? A. No, sir, I wouldn't say that, used to coerce them. The purpose of it was to publish the names of individuals who did not belong to our Local.

Q. For what purpose? A. To try and persuade them to join the Local.

• • • • •

[76]ANGELO PARKER, called at the instance of counsel for the plaintiffs as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. KAPRAL:

• • • • •

Q. Now directing your attention to the time of the alleged libelous publication, June, 1970, did you hold any position at this time with the local Union? [77]A. Secretary of the Association and editor of the paper.

• • • • •

[78]Q. Did you authorize this article to be printed? A. I did.

• • • • •

Q. To the best of your knowledge has any apology ever been made to any one of these gentlemen for the article printed bearing their names? A. Not to my knowledge.

Q. Have you as secretary of the Union apologized to them personally?

[79] MR. RATNER: I will stipulate with counsel we have not apologized, and authorized no apology, and we offer none now.

• • • • •

Q. How many persons are there in Local Branch #496, how many members do you have? A. Roughly around 400 or 420, something like that, active members.

Q. The publication Carrier's Corner, does each member receive the publication? A. Yes.

Q. Does anyone else receive this publication? A. No.

• • • • •

[80]Q. Let me ask you this. Are there papers of affiliation concerning your local Old Dominion Branch No. 496 with the National Association of Letter Carriers? [81]A. We have a charter.

Q. Pardon me? A. A charter. We are a chartered branch.

Q. Of the National Association of Letter Carriers? A. Yes.

• • • • •

[83]Q. Now let me ask you this, Mr. Parker, where did you obtain this article? You say you submitted it to the printer, where did you obtain this article published in the June, 1970 issue of Carrier's Corner concerning these three gentlemen where their name was involved? A. From the Richmond Trades Industrial Council.

Q. Is that a member of the AFL-CIO? A. Yes.

• • • • •

[84]Q. When you submitted this article for publication did you know for a fact that all three of these men were traitors of or to their country? A. Traitors to their country?

Q. Right. A. In what respect?

Q. The article says they are guilty of treason to their country. Did you know for a fact they were guilty of treason to their country? A. Not for a fact. The article isn't based on fact. The article is made up of figures of speech.

Q. Do you know they had rotten principles? A. Pardon me!

Q. Do you know they had rotten principles? A. Well, in my opinion, if a man is going to take benefits that other people have to offer him and not want to have any input in it, I think these principles are to be questioned.

[85]Q. In other words you are saying, if I am correct, that if a person stands by, such as these three gentlemen, and doesn't join the Union that he has rotten principles? A. If he is getting the, or all the benefits on his job and he doesn't want to affiliate with the people who have fought for them then I think he has rotten principles.

• • • • •
Q. So you went ahead and authorized this article to be printed, right? A. I did.

Q. Did you give any thought or any concern as to what people who read this article or came in contact with this, what they might think of any one of these three gentlemen after they read this?

• • • • •
Q. Did you give it any thought after this article was disseminated around or among the four or five hundred persons these gentlemen work with every day, what bearing this would have on their reputation? A. Well if these gentlemen are in a sense being a leech on these people they are associating with [86]every day I think it should be brought to light to the individuals they are associating with, what is going on.

Q. What you are saying, you really didn't care what they thought? A. If you want to put it that way.

• • • • •

CROSS EXAMINATION

BY MR. RATNER:

Q. Mr. Parker, I hand you a card which is printed both on the front and back and ask if you can identify that card.

MR. CHERRY: May we see the card?

MR. RATNER: You can see a copy.

NOTE: Mr. Ratner hands counsel a copy of the card.

Q. Can you identify that card? A. Yes, sir, that is the article that was published in our local paper.

Q. Is this the card you were referring to which you got from the Richmond Labor Council? [87] A. Yes, sir.

MR. RATNER: I offer it.

THE COURT: Defendants' Exhibit No. 5.

NOTE: The above referred to card is marked and filed by the Court as *Defendants' Exhibit No. 5*.

Q. Now I direct your attention to the first two lines on the side which contains the printed matter and ask you whether that contains a title and an author? A. It says A Scab by Jack London.

Q. Then does it identify who Jack London is? A. A well known author of Call of the Wild, Sea Wolf, et cetera.

• • • • •

[93] HENRY M. AUSTIN, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

DIRECT EXAMINATION

• • • • •

Q. Now prior to the publication of this article in question, and of the various other articles [94] referring to you as a scab, had your associates in the Post Office Department, fellow carriers, had any of them shown any animosity toward you? A. I always had a very very admirable association with every employee in the Richmond Post Office until this article started appearing.

• • • • •

[95]Q. Is it your own election that you don't join the Union? A. It is.

Q. Now will you tell us what occurred with reference to that publication involving you. A. Yes. The first time I was at my case working and there was a lot of laughter going on behind me and people running up and down the aisle with the publication. Not knowing what it is I didn't pay much attention to it.

THE COURT: Mr. Austin, will you talk a little slower and a little more distinctly. A. The first I realized the article was being printed with my name in it, several carriers was laughing and carrying on with that behavior behind me. I had no idea what was going on. Fifteen or twenty minutes later another carrier I know came and asked me did I realize I had made the headlines and showed me my name at the head of the list in Carrier's Corner as a scab. I ignored it the first time and thought it was a one time situation and I would just forget it.

It was about four or five weeks later this same pattern showed itself, a lot of laughter, running [96] up and down the aisles, et cetera, and again I realized my name had appeared in there as a scab. I immediately went to the Postmaster. I informed him what was going on, that coercion was being used, and the Postmaster informed me then to give him a letter to present to the Labor Relations Board. I informed the Postmaster I had no desire to make trouble for anyone but I thought Management should be advised that coercion was being used on members of the Richmond Post Office, guaranteed by the Federal Government that he doesn't have to join the Union Carriers, and coercion was being used to join the Union. Mr. Netherland, you will recall the witness, made a copy and said he would talk to the President of the local Union about it.

I guess maybe two weeks after I had seen the Postmaster the President of the local Union—who is also a mail carrier on the route where I live—when the President of the Union came by my house he stopped and we had about a fifteen

minute conversation in the yard. I informed the President of the Union although my name was appearing as a scab it didn't bother me too much because I didn't know what a scab was, but it could cause somebody to lose his job.

Just the week before a shop steward, member of the Union, came to the case where I work. Several of them were around and he called me a scab. I [97] informed the shop steward, Mr. Horsley, if you mean I am not a member of the Union, I will ask you a question. He said that is not what he meant. He said I am calling you a scab. At this time I went to the telephone again and called the Postmaster. The Postmaster was out of town. With my temper I do have, something else could have happened and both the shop steward and myself could have lost our job. For this reason I think it is bad policy for printing people's names as a scab.

Mr. Hutchins told me that is one of the tools they used and had been using on carriers who had a chance to join the Union and had not done so, and there was nothing the Postmaster could do about it. It was only a week later that this article describing what a scab actually was appeared in print. There was a lot of commotion around the office for about two weeks. No one would show it to me. Some carriers came to me and told me although they were members of the Union they had nothing to do with it, and I said nothing to do with what, and the Assistant Supervisor said you mean you haven't seen it and I said no, I haven't.

I left my case and returned to the case about five or ten minutes later and in my wastebasket beside my case was one of these publications. I picked it up and read what was in the article. I immediately then went back [98] to the Postmaster again. The Postmaster advised me I would have to take whatever action I deemed necessary. I advised him I was going to get counsel and sue. I informed Mr. Hutchins the day I talked to him in my yard that I would sue the next official of the Union who called me a scab, that I was going to sue the whole Union. The President informed me that

day I couldn't sue the Union for what some official says. I informed the President as long as he was an official representative of the Union and called me a scab I was going to take him to Court to prove what a scab was. That leads up to the time I contacted counsel.

Q. Did the President ever tell you whether they would stop this publication against you? A. No.

Q. Did he tell you how you could stop it? A. By joining the Union.

Q. Did he tell you that was the only way you could stop it? A. He told me it was nothing—I had been given an opportunity to join the Union and nothing me or the Postmaster could do to stop the printing.

Q. Except join the Union? A. That impression was left. I don't know whether the words were used.

Q. And you state you had complained to the [99] President of the Union prior to this publication of the article which they refer to as being written by Jack London? A. A couple of weeks, or a week or two weeks before this.

Q. And told him at that time you didn't know what a scab was? A. Right.

Q. Then they published this definition? A. Right.

• • • • •

[101] HENRY M. AUSTIN, resuming the witness stand, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. CHERRY: (Continuing)

Q. Mr. Austin, will you tell us how this article defining a scab, which was published in June in Carrier's Corner, came to your attention and the general reaction you had from it. A. As I stated before, several of the carriers came and mentioned to me that though they were members of the Union they had nothing to do with this particular article that appeared in this publication. At that time I had

not seen the article, but after I left my desk and went to the mail case a copy of the publication was in the wastebasket beside my desk. After reading the article, as I said, I went back to the Postmaster and then to seek the advice of an attorney.

Now this thing has affected me in several different ways, which showed me plainly they were out to maliciously hurt me, my job, et cetera. Many of the [102] carriers at the station after the article came out—we always had a good relationship, in fact, we socialized pretty much together in the afternoons and on weekends—after this article appeared most of them that I had been associating with for several years stopped speaking. At one station which I worked there was nobody in the whole office. Thus really for the last several months I have been working in what, at best, can be described as a hostile atmosphere, and which after 14 years had not presented itself, so it was the article itself which evoked the hostility.

In my social capacity outside of the Post Office as a member of the Grand Lodge Committee and a member of the Committee of Concern of the City of Richmond, and the Hundred Year Centennial, either chairman or coordinator or member of the Advisory Board, most people locally know if I am speaking right. When I get out of my immediate environment I have had, or I have to convince people of different types of programs we want to put over. That is my job in this capacity.

Back in January or March, when introduced to a group of people sitting at a table in a social capacity, one of the ladies at the table said you are Henry Austin, the scab they are talking about. I later found out this lady was the wife of a Postal employee and [103] she had read the article and had discussed it with the auxiliary and so forth. This unnerved me at the time.

The next time I approached the rostrum I am chairman of Ladies Night program and someone said is that the

same one that appeared in that paper. Most of these are also Postal employees. This unnerved me.

And starting in January I got a migraine headache that began in January and didn't leave until the beginning of March. I had to go to the Emergency Room, a specialist at MCV, the clinic, and they diagnosed it as tension and nervousness and said there was nothing—I had to do about it myself. There is not much you can do to get over this sort of thing whenever you go to work and the same hostility exist.

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[123] ROY P. ZIEGENGEIST, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

• • • • •
[124] Q. Now state to the gentlemen of the jury how you first happened to find out about this article that had your name in it. A. Mr. Austin and I became acquainted when [125] I first was employed by the Richmond Post Office. We worked together for approximately two years. Mr. Austin called me on the telephone and told me about this publication.

Q. Now once he told you about this publication, what were your feelings and sentiments right after that? A. He read the publication over the telephone word for word and I just couldn't believe it. When I came to work for the Post Office my first dedication was to the service. I was raised to believe a man should give eight hours work for eight hours pay. So I felt my first obligation was to the Postal Service. When I heard about this publication I just couldn't believe that somebody would write something like this about me, whether they knew me or not. Then I got to wondering about all these people—I have spent the biggest part of my Postal career at one station, Bon Air. I helped

to start the first delivery in the Bon Air Station. And I have associated with several of the people for that same length of time, approximately nine or ten years at this station. Several are nonmembers, some are not. I had a very good relationship with all of them. The particular job I have I carry a particular route every week when the regular man is off and during Christmas time and during the year, especially during Christmas time, I was situated in such [126] a status that I could help other people. Most of the carriers carry their own routes and I kind of float, go to one carrier and help. I have Union, non-Union members, black and white, and never have any problems. I don't go around protesting about people that belong to the Union. I have no qualms about talking to the people. This is their privilege. Just as I felt it was my constitutional right to belong or not belong to the Union, which I don't like to belong.

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[130] Q. Now tell the gentlemen of the jury what effect this article had that was published concerning you, what effect it had on both you and your family. A. I just couldn't believe it. The next day when I went to work I looked at some of these people I had been working with and had a good relationship with and couldn't imagine who had written this article or why. My wife was distraught. She didn't want me to file this suit. We argued about it several times. She was worried and didn't know what would happen next. I felt some of the people that I work with became to some extent cool and distant to me. In one case my Union representative, Mr. Robins. He got in touch with his representative downtown and tried—after the letter had been produced in the Richmond newspaper and I had filed suit Mr. Robins called his Union representative and tried to in a way get back at me or harass me with trying to charge me with falsification of truck records and not letting the [131] supervisor know where I was.

MR. RATNER: That is irrelevant to anything in this case, after the witness had filed suit and the story was published in the public press.

MR. KAPRAL: Your Honor, I feel it is very relevant and goes to show the method at the time, after suit was filed, to harass this gentleman. He had been there 12 years and this hadn't happened before.

THE COURT: Objection sustained. Objection sustained. That brings up a collateral matter, whether such was true or the motive behind it. Objection is well taken. Sustained.

BY MR. KAPRAL: (Continuing)

Q. Continue. A. As I say, I am not perfect, nobody is. I just feel I have dedicated my time. I come in and work off the clock, which is something else the Union doesn't condone. As I say, I come in 30 minutes early in the morning and work off the clock sometimes, which is something the Union doesn't condone because it has been brought up several times between the Union and Management and Management made the decision they saw no reason for a man not to work if he wanted to work. I have done this mainly to help get my job done. In many instances if I had come in off the route early my supervisor would ask me to go out and help someone else if he was stuck or had a large amount of mail, which I have done.

Q. Mr. Ziegegeist, is your wife here today, sir? A. No, sir. My wife was very distraught and very nervous and couldn't bring herself—

MR. RATNER: I object, Your Honor. What relevance does that have?

THE COURT: Sustained.

Q. Mr. Ziegegeist, in the course of this matter, particularly after suit was filed in this matter and there was some publication in the newspaper, were you approached by a person you carried mail to about this matter?

MR. RATNER: I object, Your Honor. The suit is not predicated upon publication of an article in the newspaper after the suit was filed.

THE COURT: Objection overruled.

Q. Answer the question. A. When I filed suit and the article was published in the Richmond newspaper I was approached by—

[133] THE COURT: Just a moment. Does this bring, or are you bringing into evidence, Mr. Kapral, the result of what occurred after a newspaper publication which reported this suit had been filed?

MR. KAPRAL: What was mentioned about what was written about Mr. Ziegenggeist.

THE COURT: Go ahead. A. Several people on the routes I serve mentioned to me, because a lot of them know me, not on a social basis but because I had been out there a long period of time, asked me what I had done to make the Union write such a horrible thing about me. People in the neighborhood where I lived for eight years presented such a question. The man I buy gas from, on the way to Court this morning said, Oh, Mr. Scab, you're on your way to Court this morning and I said, that is right.

Q. Let me ask you this, Mr. Ziegenggeist. Have you lost any money over this suit? A. No, sir, I haven't lost any actual money over it.

MR. KAPRAL: No further questions.

[141] CYNTHIA ZIEGENGEIST, called at the instance of counsel for the plaintiffs, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAPRAL:

Q. State your name and address. A. Cynthia Ann Ziegenggeist, 3333 Pinebrook Drive.

Q. What is your age? A. 16.

Q. Are you related to the plaintiff, Roy Ziegenggeist?
[142] A. Yes, I am.

Q. Are you familiar with the publication in which your father's name appeared, Miss Ziegenggeist? A. Yes, sir.

[143] BY MR. KAPRAL: (Continuing)

Q. Miss Ziegenggeist, will you state from your observation, firsthand observation, the effect this article had on your father. A. Well my mother and father have had many arguments since the case has come up and my mother and I have been very scared that someone might come around the house and possibly harm us.

MR. RATNER: I object, Your Honor. This is one of the difficulties with allowing that type of question to be asked.

THE COURT: Objection overruled. That tends to indicate the effect on the plaintiff. Objection overruled.

Q. Continue. A. Well, as I said, we were very scared that someone would come around our house and harm us in some way and—

Q. Let me ask you this. From your [144] observance and from what you know yourself has your father ever mentioned this matter to you, say when he came home from work days? A. Yes, when he came home he would tell us that the men at work, his friends, would give him the brush-off at work and everything.

MR. RATNER: I object.

THE COURT: Sustained.

MR. KAPRAL: I have nothing further.

[145] L. D. BROWN, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CHERRY:

[146] MR. CHERRY: May I have Exhibit 2 there.

Q. (Holding paper) Were you aware of this publication wherein they stated that members who had resigned from the Union should be treated as lepers? A. Yes.

Q. Did they treat you as a leper when you got out?

MR. RATNER: When what?

THE COURT: Do you have an objection?

MR. RATNER: The only objection is I can't seem to hear the end of counsel's question. No objection, but just my lack of ability to hear.

THE COURT: State your question again.

MR. CHERRY: Did they treat you as a leper when you got out?

MR. RATNER: Out of what? Your Honor, I don't understand the question and I do object to it.

MR. CHERRY: Out of the Union.

[147] THE COURT: What point of time, Mr. Cherry?

MR. CHERRY: When did you get out of the Union?

THE WITNESSS Approximately a year and a half ago. I don't know the exact date.

THE COURT: Next question.

BY MR. CHERRY: (Continuing)

Q. Did they treat you as a leper when you got out? A. They treated me cooly.

Q. They treated you cooly. Now was your name among these published as a scab prior to the publication of the article in question? A. On one occasion.

Q. Do you know about when that was? A. That was about in March.

Q. About March. What did you do when your name was published and listed as a scab? A. I tried to ignore it. I said probably if I didn't say anything and let it go it would go away.

Q. Now when did the next publication come out? A. The next publication came out in June.

[148] Q. Is that the one we are speaking of here which carries the definition of a scab? A. Right.

Q. When did this come to your attention? A. It came to my attention one day when I was working and happened to go into our Swing Room, where we eat lunch, and it was printed on the bulletin board.

Q. It was posted on the board? A. Posted on the board and I saw it and read it and didn't like it, but some of the

fellows were afraid I didn't see it and they called my attention to it. I had several call my attention to it.

[149] Q. How has this article affected or how have [150] you been affected by this article? A. In several ways. I have been upset ever since the article was published. I have headaches, have been nervous, and I am under the doctor's care for heart palpitation and this hasn't helped it at all. It also affects me or my family by being or working under a hostile atmosphere, when I come home it is not too easy to go along with the family after work.

Q. You refer to working under a hostile atmosphere. Did that develop after this article was published? A. Yes, it did.

Q. Can you tell us a little bit about what you mean by a hostile atmosphere? A. The fellows joke you and call me all kinds of names. Beside scab they have other names they refer to me as. They get a joke out of calling me all different types of names. Anything they can get at me with they apply to me.

MR. CHERRY: That is all.

[160] JURY OUT

THE COURT: Mr. Ratner.

MR. RATNER: May it please the Court, the defendants move the Court to strike the evidence with respect to the plaintiffs on all the grounds stated in their affirmative answers, and on the grounds of the First Amendment and the Fourteenth Amendment, and on the grounds of the Executive Order previously cited, the memorandum in support of our affirmative answers, and in our prior briefs and in the comments of the memorandum in support of the instructions which have heretofore been submitted to Your Honor.

[161] We think the evidence produced by the plaintiffs to this point in the case has itself established the validity

of our contention that the publications were constitutionally and statutorily privileged and that they were not allegations of fact but expressions of opinion, and as such beyond the reach of judicial process.

THE COURT: Motion overruled. Now are you ready to start your evidence?

MR. RATNER: Yes, Your Honor. With respect to our proposed stipulation, with respect to the definition, that is in the request for admission——

MR. STEINGOLD: It is stipulated as to truth but not as to relevancy?

THE COURT: Was it filed in all three of the cases or just in one?

MR. STEINGOLD: I think in all three.

• • • • •

[163] **MR. RATNER:** Thank you, Your Honor. Gentlemen of the jury, the Court has permitted me to read to you the following dictionary definitions of the word scab. One, the definition of the word scab which appears in Webster's New Twentieth Century Dictionary Unabridged, Second Edition, published by World Publishing Company in 1958, Page 1614, is and I quote "scab, n., 5. * * * "in the labor movement, (a) A worker who refuses to join a Union, or who works for less pay or under different conditions than those accepted by the Union. (b) A worker who refuses to strike or who takes the place of a striking worker." That is the end of the quotation from Webster's New Twentieth Century Dictionary.

Two, the definition of the word scab which appears in Webster's Seventh Collegiate Dictionary, published in 1966 by G. & C. Merriam [164] Company, and which is contained in the Seventh Edition at Page 766, relating to the word scab, to its use in the labor movement, is "3.(b) One who refuses to join a Labor Union."

Three, the definition of the word scab which appears in Funk & Wagnall's New Standard Dictionary of the English Language as to the labor movement is "scab, 5. A workman

who does not belong to or will not join or act with a Labor Union; one who takes the place of a striker."

Four, the definition of the word scab which appears in Century Dictionary Encyclopedia, 1897, Volume 8, Page 5365, relating to the labor movement as "scab, 4. Specifically in recent use, a workman who is not or refuses to become a member of a Labor Union, who refuses to join in a strike, or who takes the place of a striker. An opprobrious term used by the workmen or others who dislike his action."

Five, the definition of the word scab which appears in Murray's New English Dictionary, in 1914, Volume 18, Page 156, relating to the labor movement. "scab, 4. (b) A workman who refuses to join an organized movement on behalf of his trade."

[165] Six, definition of the word scab which appears in the Oxford Dictionary, Volume 9, Page 155, 1933 and 1961, James A. H. Murray, Editor, relating to the labor movement, is "scab, 4. (b) A workman who refuses to join an organized movement on behalf of his trade."

We will now call Kenneth Fiester as the first witness for the defense.

KENNETH FIESTER, called at the instance of counsel for the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RATNER:

Q. Mr. Fiester, what is your name and address. A. Kenneth Fiester. I live at 12406 Skylark Lane, Bowie, Maryland.

[167] Q. What is this organization you refer to that you are President of? A. Well, that, nearly all the national or international unions and many of the geographical labor bodies, State and City bodies, and quite a large number of local unions, publish magazines, newsletters and so on. A large number of those that are produced by AFL-CIO

organizations have formed again a voluntary organization called International Labor Press Association, and about 400 of those publications are in our association. We do restrict ourselves to AFL-CIO associations because we are a fraternal arm of AFL-CIO. And the association functions, I might say, like a trade association in another field. [168] That is, it is not a news service, but just by coincidence, one of our current endeavors is attempting to get what we think is a more equitable deal on postal rates than the new Postal Service proposes to give us.

Q. Have you had experience in your lifetime which has caused you to become familiar with or to read or to examine a wide variety of union periodical publications. A. Well, in one way or another I would say I have been connected with union publications for 30 years, even before I was employed by unions, and, of course, now in my present office I see all of our member publications. They must send us each issue and I look at all of them.

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[169] Q. Mr. Fiester, I hand you what has been received in evidence in this proceeding as Defendants' Exhibit No. 5 and show you the front of this card which has a legend on it headed in larger type than the other, A Scab. A. (Looking at card)

Q. And I ask you whether you are familiar with the material which appears thereon? A. Yes, I am.

Q. How did you become familiar with that material?

A. Well, I suppose the first time I saw this must have been 30 years ago or so. I can't pinpoint the occasion. The last time I saw it before this I think was about ten days ago when our office received a leaflet published by the Rubber Workers Union, which had various articles in it. It was not a periodical, a pamphlet, and this was included in it. It has been around in the labor movement for at least 30 years. Since Jack London died in 1916, it might be longer than that, but I can't testify to it.

Q. Can you give us an estimate of the number of times you have seen that legend published in union publications in one sort or another over your lifetime? [170] A. No.

Q. Why can't you give us that? A. Because it has been published so often. I wouldn't attempt to make a count. It is something that—let me put it this way, most of the time I have been editor of a union publication of one kind or another. All of us, I think, who have engaged in this work are familiar with this quotation. It is something of a classic in the labor movement and when circumstances seem appropriate or when we say to ourselves, perhaps as editors do, well we haven't done anything like this in a long time, we put it in the paper so it keeps popping up all the time. It has been used on handbills and so on. I know the textile workers for whom I worked many years used it frequently.

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[171] CROSS EXAMINATION

[172] BY MR. KAPRAL:

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[173] Q. You stated during the last 30 years and the time you have been involved in the labor movement you have many many numbers of times seen this article appear?

A. Oh, yes.

Q. Have you seen this article appear in connection with any of these three gentlemen before? A. No, I don't know these gentlemen.

Q. Have you ever seen this article appear listing certain persons names? A. Not as individuals, no.

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[182] JOSEPH JOHNSON, called at the instance of counsel for the defendants, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RATNER:

Q. State your name and address. A. Joseph Johnson, 4733 Southland Avenue, Alexandria, Virginia.

Q. Mr. Johnson, what is your position? A. I am National Field Director for the National Association of Letter Carriers and on the Executive Board of the National Association of Letter Carriers.

Q. What is your territory? A. My territory encompasses Virginia, West Virginia, Maryland and Washington, D.C.

Q. Where is your office located? A. 100 Indiana Avenue, N.W., Washington, D.C.

[183] Q. In your capacity as National Field Director of the National Association of Letter Carriers did you have anything whatsoever to do with writing, editing, printing, mailing, supervising or directing the publication known as Carrier's Corner? A. No.

Q. The upper left-hand corner of the bottom of the page, one corner of Carrier's Corner, carries what has been referred to as a seal of the National Association of Letter Carriers. Is that a seal of the National Association of Letter Carriers? A. No, that is the emblem of the National Association of Letter Carriers. All trade unions have a particular emblem and this is the carriers at the national and local level whenever you put out anything.

Q. The purpose is to demonstrate affiliation? A. Right.

Q. Would you look at the line that immediately appears under the Old Dominion Branch on that front page. A. (Looking) National Association of Letter Carriers?

Q. Yes. A. AFL-CIO.

Q. That also is designed to demonstrate [184] the affiliation? A. Right, absolutely.

• • • • •
[190] Q. Did you see any of the issues of Carrier's Corner which have been introduced in evidence here, particularly this one that has been marked Plaintiffs' Exhibit No. 2, before it arrived at your home in the normal course?

A. No.

• • • • •

[196] Q. You have heard in this courtroom, sitting here this morning, my description and why Union men and the Unions regard nonmembers as an anathema. Would you tell us please, in your own words, what you consider a scab to be and what your attitude is toward a scab. A. Well I know for a fact, or always considered a scab a non-union member, and I personally have no use for a scab because I feel he takes money and bread out of my mouth. I feel strongly when I pay my dues in order to gain these benefits and somebody is going to walk in my face and say I am going to get it whether I pay or not. Honestly, the Jack London article, the first time I saw it was in the paper, but I think it expresses sometimes the way a person feels, figuratively speaking. I feel strongly when I know, and I know the benefits involved that were gotten through the efforts of the Union. No man in this Post Office, Union or not, can go to the Postmaster and ask for a pay raise and get it. The Postmaster does not have the authority to give it to him. No man can go to the Postmaster and ask for a route and get it. The Postmaster does not have the authority to give it. These are worked out by the Union and it cost money to run the Union, and that is the way I feel about a Union.

[199]

CROSS EXAMINATION

BY MR. KAPRAL:

Q. Mr. Johnson, as far as Carrier's Corner is concerned, the seal in the left-hand corner states National Association of Letter Carriers. I believe you referred to that as an emblem other than a seal? A. That is what it is, an emblem.

Q. Aren't seals and emblems the same thing? A. No, a seal is a little round thing that has an impression on it. But this is on stationery in the corner just like a letterhead. It is the emblem of the National Association of Letter Carriers. We have it on uniforms and different things. We

just put the emblem on.

Q. It is true, is it not, an employee has a legal right not to affiliate with you if he chooses not to. Isn't that right? A. Right.

Q. This publication which is in question here, and this was actually a tool wasn't it, used by Local Branch No. 496 to urge or persuade these nonmembers to join the Union?

[200] A. That is what they said, but I have no part in it.

Q. I asked whether this was a tool to urge or persuade these people to join the Union? A. That is what they say. So if that is the way they felt, it was a tool.

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[204] LAWRENCE HUTCHINS, called at the instance of counsel for the defendants, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. RATNER:

Q. Mr. Hutchins, you have previously testified in this case, have you not? A. Yes, sir.

Q. One of the plaintiffs testified to a conversation that he had with you on your route concerning his nonmembership in the Union. Do you recall who that was? A. Yes, Mr. Henry Austin. I serve his home address at 2310 Marvin Drive.

Q. Will you tell us what you recall about that incident? A. Well as I approached his home to make his delivery he was sitting on the porch and said something, best I can recall, I see you are publishing my name in the local newsletter because I am not a Union member, and I said yes. And he said I may agree with the Union in its principle but I have the right not to affiliate with it, and I said yes, that is your right. We also have the right [205] to get all of the people in our craft to associate with our organization. He said if you continue to do it somebody is going to get hurt and I will see some action is taken

against somebody if you continue to publish my name in that paper. That is as best I recall.

Q. What did you say? A. I told him that was his right to exercise any privilege or opportunity he had to gain relief.

Q. Did you state to him that this was one of your tools you used? A. I can't recall specifically making that remark to him.

[208]

CROSS EXAMINATION

BY MR. CHERRY:

[210] Q. Can you explain to us why you published Austin's name three times? A. We published his name three times because we were publishing all known non-union members names. As more names appeared and came to us, we published the ones we had first, and as we got more names we continued to add it to the list.

Q. Why were you publishing the list? A. To publicize to fellow members of the Letter Carriers Association that these members did not belong to the Union.

Q. Why did you want to publicize that? A. So it would be general knowledge that these are the individuals.

Q. Why did you want it general knowledge? A. So the people who associate with them [211] would know it.

Q. Why did you want these people to know it? A. For their own information.

Q. So they would stop associating with them? A. Yes, sir, if that is what they wanted to do because they were non-union members. Here we were dealing with individuals who even the right to have insurance, which most people in private industry have, this right to have insurance that one of the plaintiffs has testified to he paid an additional cost for, even this right to have insurance was gained for him by Union efforts. Even rights the public doesn't know about, as far as good Postal service is concerned, is the

concern of good Union members. Consequently we thought here was an individual riding on somebody's coattail and earning his keep by the sweat of somebody else's brow.

Q. All right. Then it follows that you wanted it publicized so as to persuade these people to join the Union? A. Yes, sir.

Q. And by joining the Union they were joining the National Union, were they not? A. No, sir, Local Branch No. 496.

[212] Q. And the National level, too? A. Only predicated upon meeting certain requirements, which the National has a right to decide whether they can become National members.

Q. If you didn't become a member of the National Union in due course would you remain in the branch? A. No.

Q. So becoming a member of the branch was predicated on becoming a member of the National Union? A. Yes, sir.

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[215]

IN CHAMBERS

THE COURT: I thought what I would do, gentlemen, is discuss generally the posture of instructions. I have read over the ones that each [216] of you have submitted and have some changes in my mind, and then maybe after you leave I will work on them a while and if convenient, have you meet me at 9:00 o'clock in the morning and then, hopefully, we can get it to the jury.

I guess you have a Motion you want to put on the record at the conclusion of all the evidence, Mr. Ratner?

MR. RATNER: We would like to renew the Motion to strike plaintiffs' evidence. We would move the Court to dismiss on the grounds of the first two amendments or first two—or all four grounds of the affirmative answers, and we would renew our Motion based on the Executive Order and the First Amendment and Fourteenth, as a matter of law.

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]217[THE COURT: The Motion is overruled.

MR. STEINGOLD: If Your Honor please, I join Mr. Ratner's Motion on behalf of the Local, so the record will be clear.

THE COURT: That is also overruled.

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IN CHAMBERS

[226] OBJECTIONS AND EXCEPTIONS TO
 GRANTING OR REFUSING INSTRUCTIONS

THE COURT: The main instruction, of course, on the question of liability, is being typed and you have not seen that so I will tell you, and it would be obvious from the instructions the way the Court has ruled on various points. First of all, Mr. Ratner, I feel under our, under the law in Virginia relating to liability, that the burden of proof has to be by a preponderance of the evidence rather than clear and convincing evidence.

Second, I feel that reasonable men could not differ as to the responsibility of the national union for the action of the local, in the main based upon the United Brotherhood case and the Laburnum case, which I am sure you are familiar with.

[227] Our Court of Appeals in the Laburnum case, which was affirmed by the United States Supreme Court, our Court of Appeals held that by the very nature of the organization and the interest of the national union in that case, the evidence was sufficient to show that an agency relationship existed between the two bodies.

The facts of the Laburnum case as to that involved the United Construction Workers, affiliated with the United Mine Workers. There was an affiliation as part of its charter fees, initiation fees, and dues were paid to the United Mine Workers of America. According to the defendants' brief, "Its members are a part of UMWA, but retain their identity, membership rights and privileges at all times as members of District 50." District 50, the Court said, is an arm or branch of the United Mine Workers of America.

That is not a complete recitation of facts in that case but unless the plaintiffs feel otherwise, that is that the question should be submitted to the jury, I feel the Court should decide that as a matter of law, and if a verdict is [228] for any one or more of the plaintiffs it should be against both defendants based on that.

MR. RATNER: I object and except to that.

THE COURT: Maybe you would want to object when you see the instruction. I am just preliminarily pointing it out so it might help you to understand. Number one, preponderance of the evidence and not clear and convincing evidence. Number two, the liability is on both defendants, if there is liability at all. So the final instruction that is being typed up now will deal with the merits or liability feature of the case, which probably won't make either side happy but that might mean it is not completely in error.

After you have seen all of the instructions, if you will hand me such of your original instructions as you want me to mark refused so you can save any points or objections you have, I will help you there.

• • • • •
[232] THE COURT: Let the record show the instructions tendered by the defendants, A through P respectively, are refused and the Court will grant instructions one through seven.

MR. RATNER: We have no objection as to *Instruction No. 1*, aside from our objection as [233] previously stated in not taking the case from the jury and directing a verdict for the defendants.

We have no objection to *Instruction No. 2*.

We object to any instruction based on a preponderance of the evidence and its meaning, which is *Instruction No. 3*, believing that the law, applicable law as defined by the Supreme Court of the United States, requires clear and convincing evidence and that the burden of proof be on the plaintiffs of every element necessary to recover.

We object entirely to *Instruction No. 4*, with the single exception of the paragraph third from the bottom, which in our view is not entirely erroneous. We object particularly to the definition and use of the term "actual malice" as equated with sinister or corrupt motives such as hatred, personal spite, ill will, or desire to injure the plaintiffs, on two grounds. First, there is not evidence of record there was any such motives. Secondly, on the grounds that is not the constitutionally accepted definition of the term "actual malice" as defined by the Supreme Court, [234] which relates exclusively to factual falsity or lack of concern for factual truth or falsity.

THE COURT: Let me state on that point, Mr. Ratner so you will know the reason the Court put it in those terms. Our statute on insulting words speaks of words spoken. Professor Prosser and other texts, of course, specifically in that example on Page 759 in Prosser on Torts, 3rd Edition, the Court there talks of distinction between assertions of fact and those of opinion, and goes on to say that there is occasion in which matters of opinion, as contrasted to statements of alleged fact, may certainly be defamatory. I think that is the state of the law in Virginia under the statute on insulting words.

The cases cited by the defendants, of course, all deal in the main with newspaper reports of events rather than in the context here. Really this is not a report of any event in the sense that it was a report in the press. This is really the written statement or opinion—as the case may be—in that it is a purported definition of a scab. And so for those reasons in the main, I feel under our Virginia law that it [235] is not necessary that matters of fact be misrepresented or that the plaintiffs be restricted merely to showing that there have been assertions of fact which are not true.

MR. RATNER: Thank you. Merely to keep the record perfectly straight, we are not relying upon Virginia law but rather upon the Constitution of the United States as construed by the Supreme Court of the United States. We

think the fact that the publication is not in a newspaper of general circulation but in a union leaflet mailed to the homes of its members, making it, if anything, more than less privileged constitutionally, and that the fact that what is used in hyperbole and figures of speech rather than fact or opinion, make it absolutely immune. But we are relying not upon the Virginia law for this. I make it clear. Our reliance is upon Constitutional law and predominant doctrine.

THE COURT: As to Instruction 1 through 7.

MR. RATNER: And, indeed, Your Honor, I should add we have attacked the Virginia statute, both on its face and as applied, on overbreadth and [236] vagueness grounds and we renew that objection in light of these instructions.

I object to *Instruction No. 5* both on the grounds of the preponderance of the evidence standard and for its failure to specify that there is no possibility of recovering for a mere show of injured feelings resulting from words spoken concerning the plaintiffs on a privileged occasion, by persons privileged to communicate and to hear, and, that they are not entitled to recover for loss of favorable social relationships on the part of persons who are offended by the conduct referred to in the written publication.

We object entirely to *Instruction No. 6* for the reasons stated in our comparable instruction.

MR. STEINGOLD: I want to add to that that the instruction tells the jury that there is no limit whatsoever to the amount of their verdict.

THE COURT: Of course, it is limited by the amount sued for.

MR. STEINGOLD: It doesn't tell them that.

[237] MR. RATNER: Nor, I believe, is the jury told at any point in these instructions that the only damages they can award are those directly attributable to the publication of the specific article sued on, mainly the one with the London definition in it, and it does prevent recovery of damages for any losses attributable to prior publications, such

as January through March, 1970, which are not the subject matter of complaint at all, and yet the subject matter of the testimony.

THE COURT: I wondered about that when the evidence came in. There wasn't any objection on that evidence on these prior occasions. But shouldn't the jury be told they can only award damages, if any, as a result of any injury resulting from the publication sued on. There has been evidence of prior publication, and perhaps even if objection had been made, it was admissible to show motive or intent. But shouldn't the jury be told they cannot award damages except those which flow directly from the publication in June, 1970?

MR. CHERRY: Correct.

MR. KAPRAL: I think that is correct.

[238] THE COURT: Perhaps in Instruction No. 4, in the second paragraph, that could be handled by, circulated defamatory statements, and add in June of 1970, with actual malice—. And then at the end of that paragraph, you may not award damages for statements made at other times or other occasions.

MR. RATNER: Yes.

MR. KAPRAL: That takes care of it.

MR. RATNER: I did want to say, Your Honor, with respect to—I don't see the instruction relating to the liability of the National Association.

THE COURT: It is in Instruction No. 4. The jury is told that if the plaintiff proves by a preponderance—under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence.

MR. RATNER: I wish to make a specific exception to that portion of *Instruction No. 4*, second paragraph, which has just been referred to. A, to the finding as a matter of law by the Court that Branch No. 496 was acting as the agent of the defendant National Association. If there is any [239] evidence in this record that permits any conclusion that indeed the National Association was a respondent

civily under the principles of respondeat superior, such a conclusion of liability could only be drawn by the jury. However, we further object on the grounds that as a matter of Federal law, Federal predominant law, and Federal freedom of speech law, under the circumstances of this case there can be no attribution of liability, 209 in ALC, for the acts of Branch No. 496 in connection with the publication of Carrier's Corner, under the circumstances shown by this record.

In connection with *Instruction No. 4* we specifically except and object to the failure of the Court to define in its first paragraph what is meant by the term privileged and what constitutes abuse of such privilege.

Instruction No. 5, the defendants except to the instruction that a jury is entitled to award damages to compensate the plaintiffs for any insult to them, and except to the failure of the Court to instruct the jury that in order to an insult to be compensable at all that actual [240] monetary loss resulting therefrom must be proven and that mere "pain and mental suffering and mortification" resulting from an insult is, as a matter of Federal Constitutional law, not compensatory and may not form the basis of an award if it is for compensatory or punitive damages.

Instruction No. 6, we except to the incorporation, by reference, of the definition of actual malice previously given and for the reasons previously stated. We object to the failure of the Court to instruct the jury that in order for compensatory and punitive damages which may be awarded to avoid excess, and that objection is predicated upon decisions of the Supreme Court of the United States defining limitations of the State Court libel law in damage actions, particularly where labor disputes are involved. The second paragraph of *Instruction No. 6*, the defendants object to the failure of the Court to determine what the jury should consider and in what light it should consider the relationship of the particular plaintiff and the defendants to each other, particularly in the absence of any definition [241] of the

scope of privilege. In short, we object to these instructions as totally open ended and incompatible with the guidelines laid down by the Supreme Court of the United States for the trial of these actions.

We object to *Instruction No. 7* on the ground that it erroneously incorporates the liability of the NALC upon a finding of liability of Branch No. 496. I am speaking now of paragraph one and two.

MR. STEINGOLD: If Your Honor please, I would like to add, and for Your Honor to hear this objection to *Instruction No. 4*. In addition to Mr. Ratner, the first paragraph of *Instruction No. 4* refers to a privilege but doesn't define privilege, which leaves both counsel and the jury without any yardstick with which to argue even.

THE COURT: The evidence you have shown by your evidence, that under the circumstances here that the union had a right to encourage membership and had a right to make—as pointed out later—had a right to make statements, words of abuse, indicating dislike, low opinion and so forth, and that vulgar name calling, hostility [242] or ill will is allowed. For that reason it was left without any further elaboration of privilege. Certainly you may argue that a union, as I am sure you will under the evidence, that the union had a right under these circumstances to do more than if the privilege has not existed. Go ahead and make your objection. That is the reason I didn't elaborate further on that.

MR. STEINGOLD: The third paragraph of *Instruction No. 4* is a finding instruction embodied into this definition instruction. It tells the jury unequivocally that the statements complained of are to be considered defamatory and libelous.

THE COURT: If—

MR. STEINGOLD: If they prove they were made, and we don't deny they were made.

THE COURT: If they prove such statements were in words which from their usual construction and common

acceptation were considered as insults, I am leaving that to the jury to decide.

MR. STEINGOLD: It starts out there as privilege, without defining privilege, and disregards [243] privilege and tells them it is the same as two individuals fighting in the street and cursing each other.

THE COURT: First of all, if the jury finds the words are not defamatory then that is the end of the case.

MR. STEINGOLD: Assuming they find they are defamatory in the ordinary sense of two individuals who hate each other, this is a trade union case, and as Your Honor has stated in paragraph one, that is a certain privilege. But then the Court abandons privilege and tells the jury this is just plain ordinary malice.

THE COURT: I didn't mean to do that, Mr. Steingold, I think if you will look at the second paragraph closely, that is the premise on which the instruction is based. Under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence, number one, that the defendant circulated defamatory statements. Within that, the jury has to know what a defamatory statement is under the law. And, two, that the statements were actually malicious. And, third, that such defamatory statements, [244] if any, caused damages. Those are the three. That is the thought I intended to convey. Number one, the plaintiff has to prove because of the privilege, that these were defamatory statements, were circulated with actual malice, and that the plaintiff suffered injury. Then the third, fourth, fifth and sixth paragraphs attempt to define those terms, and then they conclude with if you find the plaintiff has proven that you will find against the defendants. If you find the plaintiff has failed to prove that by a preponderance of the evidence you will find in favor of the defendants. That is the way I intended the instruction, the meaning I intended to convey. But you certainly save your point.

MRS STEINGOLD: We object and except to it.

MR. RATNER: I also would except for the failure to include, in that very same paragraph Mr. Steingold had reference to, the fact that the words in their usual ordinary construction and common acceptance—in that context, the setting they were used, namely a labor dispute context, which would make the dictionary definition of the [245] term as used in a labor dispute context, the usual and ordinary acceptance, or understanding, of the definition of the term.

THE COURT: You don't have objections to that do you, Mr. Cherry? What was that phraseology—

MR. RATNER: Inasmuch as these words were used in a labor dispute context.

THE COURT: Add that at the bottom of the page, they are to be construed according to their usual construction and common acceptance—

MR. RATNER: Under the circumstances of this case, That would be the dictionary term as used in a labor dispute.

THE COURT: You had some better language.

MR. RATNER: Inasmuch as the words were used, under the circumstances of this case, in the context of a labor dispute.

THE COURT: Under the circumstances of this case, that is, in a labor dispute.

MR. RATNER: Right.

THE COURT: So I will add—

[246] MR. RATNER: That would be the dictionary definition of the term as used in labor disputes.

THE COURT: I would not highlight that evidence. You can argue that. The jury may say well, the definition in the dictionary of a scab is fine but this was more than a dictionary definition that was printed, so for me to point up the dictionary definition alone would not be proper. I will add at the end of paragraph four—that is, they are to be construed according to their usual construction and common acceptance under the circumstances of this case, that is, in a labor dispute.

HERE ENDS ALL OBJECTIONS AND-EXCEPTIONS
TO GRANTING OR REFUSING INSTRUCTIONS

[282] THE CLERK: Gentlemen of the jury, have you agreed upon your verdicts?

THE FOREMAN: Yes, sir.

THE CLERK: In the case of L. D. Brown versus Old Dominion Branch No. 496 National Association of Letter Carriers AFL-CIO and the National Association of Letter Carriers AFL-CIO we, the jury, on the issues joined find in favor of the plaintiff and assess his compensatory damages at \$10,000.00 (ten thousand dollars) and his punitive damages at \$45,000.00 (forty-five thousand dollars) or a total of \$55,000.00 (fifty-five thousand dollars). S. H. Flinn, Foreman.

In the case of Roy P. Ziegengeist versus Old Dominion Branch No. 496 National Association of Letter Carriers AFL-CIO and the National Association of Letter Carriers AFL-CIO we, the jury, on the issues joined find in favor of the [283] plaintiff and assess his compensatory damages at \$10,000.00 (ten thousand dollars) and his punitive damages at \$45,000.00 (forty-five thousand dollars), or a total of \$55,000.00 (fifty-five thousand dollars). S. H. Flinn, Foreman.

In the case of Henry M. Austin versus Old Dominion Branch No. 496 National Association of Letter Carriers AFL-CIO and the National Association of Letter Carriers AFL-CIO we, the jury, on the issues joined find in favor of the plaintiff and assess his compensatory damages at \$10,000.00 (ten thousand dollars) and his punitive damages at \$45,000.00 (forty-five thousand dollars) or a total of \$55,000.00 (fifty-five thousand dollars). S. H. Flinn, Foreman.

Gentlemen of the jury, are these your verdicts?

THE JURY: Yes, sir.

THE COURT: Is there any Motion that the jury be polled before being discharged.

MR. RATNER: Yes, Your Honor, we would like to have the jury polled.

THE CLERK: As your name is called [284] please answer whether or not this is your verdict.

NOTE: At this time each juror is polled individually as to whether this is his verdict and each answered in the affirmative.

THE COURT: Is there any further Motion before the jury is discharged? Mr. Ratner, any Motion based on the law of the case usually comes after the jury is discharged.

Gentlemen of the jury, the Court desires to thank you for your service on these cases for these two days. You are now discharged from your services on these three cases and also for the term as jurors.

NOTE: The jury now retire from the courtroom.

THE COURT: Is there any Motion?

MR. RATNER: Yes, Your Honor, the defendants move for judgment notwithstanding [285] the verdict. The judgment is utterly unsupported by the evidence and the law. With respect to the evidence, we submit there is no evidence whatsoever in this record that the publication complained of, and its mailing by the defendant to the homes of its members, tended in any way or in any degree toward violence or a breach of the peace, and consequently it could not conceivably be a violation of the statute on insulting words. For that reason alone, in addition to all the reasons heretofore stated in support of our demurrer; the Motion to strike the plaintiffs' evidence, in support of our Motion for Judgment at the close of all the evidence; in support of our objection to the Court's failure to direct a verdict for the defendants in the first instance; we move that the judgment, notwithstanding the verdict, be entered for the defendants.

THE COURT: Mr. Ratner, the Court, of course with the able assistance of counsel, has had an opportunity to review these questions both on demurrer and within the last week in view of the authority furnished to the Court, and so the

Court feels that no further time will [286] be necessary for it to consider the questions of law which have been raised. So therefore the respective Motions in these three cases are overruled and judgments are entered today on these verdicts with the objections of the defendants noted for the record.

MR. RATNER: To preserve the record, if I may I would like to make a further Motion, that the Court order a new trial in this case for all the same reasons stated previously.

The third Motion is a Motion for remitter, of the amount of the punitive damage award. This rests on separate grounds and is supported by authority cited to the Court heretofore of the Supreme Court of the United States holding that the Supreme Court would not allow a punitive damage verdict in a labor libel case excessive in amount because they can bankrupt the Union. And in my view, the defendants respectively submit that the punitive damage award in each case of \$45,000.00 against the compensatory allowance of \$10,000.00—which itself is utterly unsupported by the evidence—is totally excessive and constitutionally unpermissible. [287] We ask the Court for a remitter.

THE COURT: Motions overruled.

MR. STEINGOLD: Note our exception.

HEARING CONCLUDED

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PLAINTIFFS' EXHIBIT 2

Change in Branch Meeting

Branch meeting for the month of June will be held on JUNE 13, 1970 at the St. Luke Building (same location as the Branch office) 900 St. James Street at 7:30 P. M.

President's Message

Our local contract leaves a lot to be desired, but there are certain provisions of which we are failing to take advantage. Article XII on page eleven of the Local Agreement reads in part as follows: A case written against an employee will not be referred for inclusion in the personnel folder or accepted for other action unless the file shows (1) the immediate supervisor has contacted the employee in writing about the matter, (2) the immediate supervisor has given the employee an opportunity to reply in writing, and (3) the immediate supervisor has informed the employee of his findings, conclusions, and course of action, and he has also informed the employee in writing that the file is being sent for inclusion in his official personnel folder.

I have found in dealing with adverse action appeals, that far too many carriers take too lightly the yellow back slips that are given

them to record their answers to some incident. These off hand answers often come back to play an important roll in adverse action hearings.

When you are required to answer in writing, insist that you be informed if your answer is satisfactory, and what the supervisor proposes to do with it. These rights are afforded you under provisions of the Local Agreement; use them.

Another area of the agreement that we fail to take full advantage of is the supplemental agreement dealing with ill or injured employees. It states thusly: The regular or substitute carrier assigned to light-duty shall perform on a route the casing of mail for same day delivery, strapping out of such cased mail, preparing of necessary relays, completing all mark-ups, labeling cases, rewriting carrier books, assisting at facing desk, assisting in processing mark-ups on other routes, performing safety checks on vehicles, assisting supervisors in answering telephones, and receive and investigate patron complaints. The supervisor may assign other light duty with-in the letter carrier craft.

With these provisions in our contract it should not be necessary for carriers to have to change their tour of duty to report to work at 5 P. M. in the evening in order to gain 8 hours employment. With this contract enough work can be found at each station to keep each carrier gainfully employed.



Carrier's Corner



Old Dominion Branch — 496

NATIONAL ASSOCIATION OF LETTER CARRIERS

AFL-CIO

RICHMOND, VIRGINIA

900-902 St. James Street
Richmond, Va., 23220
Phone 649-7882

Mr. Spencer Davis
1904 Georgia Avenue
Richmond, Virginia 23220

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Permit No. 1921

It took a great deal of work by many people to gain these provisions regardless of how meager they are. If the occasion demands, use the contract; it was written to protect you.

The State Convention is being held this year on June 5, 6, & 7 in Alexandria, Va. Because of this our June Branch meeting will be postponed until Saturday, June 13.

L. G. HUTCHINS

Labor-Management Meeting

MAY 13, 1970

Branch 496 Agenda Items

Item No. 1: A discussion on the application of part 774.2 (Quality Step Increase) in the letter carrier craft.

Disposition: The Postmaster is positively promoting the Incentive Awards Program with all employees of the office, and has instructed supervisors to give particular attention to outstanding performance for appropriate recognition.

Item No. 3: The procedure used in placing the names of sick employees on the change action notice.

Disposition: All employees are encouraged to submit to their immediate supervisor the names of co-workers who are sick or hospitalized; such information to be forwarded to the Personnel Office for publication.

Per Capita Tax Due

All members of Branch 496 who are paying dues through the Secretary are advised that their Per Capita Tax is now due. Please mail to: W. W. Manning, 2301 Barton Avenue, Richmond, Va., 23222.

Checks should be made payable to Branch 496, N.A.L.C.

Stylecraft Uniform Co.

Stylecraft Uniform Co. has repeatedly refused to support our Branch endeavors, yet some members still purchase from them. We solicit your cooperation in purchasing only from vendors who support our cause.

The Scab

Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some evil substance left with which He made a scab.

A scab is a two-legged animal with a cut-screw soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esaú sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

Esaú was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

LIST OF SCABS

Henry Austin	Richard Leonard
Lewis Bolton	F. E. Moriconi
E. D. Brown	Judson Proctor
L. D. Brown	Wilford Tevis
R. L. Broughman	Hunter Whitlock
R. L. France	R. L. Worsham
Roger Hanson	R. P. Ziegengrist
Randolph Jacobs	

Slow Pitch League

The committee met on May 27, 1970 and the following additional rules were adopted:

11. In the event a player is called out for leaving a base too soon, the runner is out and the ball is declared dead, or no pitch. The batter and all other runners return to their respective bases.

12. A player can only play with one team. Playing with other than your designated team will forfeit game.

13. Homeplate umpire is the official time keeper.

Each home team is requested to furnish an additional ball. (First team listed on schedule is home team.) It is requested that courtesy in manners be extended to spectators and players at all times. Expenditures were listed as follows: \$92.00 equipment; \$82.00 1/2 season salary for two umpires. All participating stations are expected to finalize their financial report at Branch meeting.

STANDINGS

SOUTH-WEST		NORTH-EAST	
Main Office.....	3-0	Bellevue.....	3-0
Southside.....	3-0	East End.....	1-3
Amphill.....	2-1	Lakeside.....	1-3
Ridge.....	1-2	Saunders.....	2-2
Stewart.....	0-3	West End.....	0-2

SCHEDULE

JUNE 13, 1970

Amphill vs. Ridge	6:00 P.M.
Lakeside vs. Stewart.....	6:00 P.M.
West End vs. East End.....	7:15 P.M.
Main Office vs. Bellevue.....	7:15 P.M.

JUNE 20, 1970

Saunders vs. Southside.....	6:00 P.M.
East End vs. Stewart.....	6:00 P.M.
Ridge vs. Bellevue.....	7:15 P.M.
Amphill vs. Main Office.....	7:15 P.M.

JUNE 27, 1970

Bellevue vs. Amphill.....	6:00 P.M.
Saunders vs. Main Office.....	6:00 P.M.
Southside vs. East End.....	7:15 P.M.
Lakeside vs. West End.....	7:15 P.M.

Branch Picnic

Branch 496 Annual Picnic is scheduled for July 12, 1970 at UP & AWAY DUDE RANCH. Ask your Station Rep. about the goodies.

The following Firms have made our Bulletin Possible

ITT HAMILTON LIFE & DISABILITY INS.
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Defendants' Exhibit 3

**Constitution
of the
NATIONAL ASSOCIATION
OF LETTER CARRIERS
of the
UNITED STATES OF AMERICA**

As amended at the Forty-sixth Convention.
Boston, Massachusetts, August 18-24, 1968

WASHINGTON, D. C.
1968

ARTICLE VII**Nominations and Elections**

Sec. 2. When there is more than one candidate for the same office it shall require a majority of all votes cast for such office to elect, such votes to be by ballot. When there are more than two candidates for any office, the one receiving the lowest number of votes on each ballot shall be dropped until an election is had: Provided, That when there is but one candidate for any office the President may declare his election by consent.

Defendants' Exhibit 4

By-Laws of Old Dominion Branch No. 496 N.A.L.C.

ARTICLE VIII**Fees, Dues, Fines, and Assessments**

Section 2. Dues in this Branch shall be \$60.00 per year and is to be paid in monthly installments of \$5.00.



DEFENDANT'S EXHIBIT 5

A SCAB

By JACK LONDON

(Well known author of "Call of the Wild," "Sea Wolf," etc.)

After God had finished the rattlesnake, the toad, the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water-logged brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and angels weep in heaven, and the Devil shuts the gates of Hell to keep him out.

No man has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas Iscariot was a gentleman compared with a scab. For betraying his master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas Iscariot sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The modern strikebreaker sells his birthright, his country, his wife, his children and his fellow men for an unfulfilled promise from his employer, trust or corporation.

Esau was a traitor to himself; Judas Iscariot was a traitor to his God; Benedict Arnold was a traitor to his country; a strikebreaker is a traitor to his God, his country, his wife, his family and his class.

FOR

- ✓ SECURITY
- ✓ HIGHER WAGES
- ✓ PAID VACATIONS
- ✓ EMPLOYEE RIGHTS
- ✓ SENIORITY
- ✓ ADVANCEMENT
- ✓ SAFETY
- ✓ PAID HOLIDAYS

... That's why People

STRIKE!

— . —
VIRGINIA STATE AFL-CIO
102 North Belvidere Street
Richmond 20, Virginia



Defendants' Proposed Instructions**INSTRUCTION No. A**

The Court instructs the Jury:

You are instructed that under the circumstances of this case, the publication complained of is constitutionally privileged and protected against a state law libel action by the Fourteenth Amendment to the Constitution of the United States, as that Amendment incorporates the freedom of press guarantee of the First Amendment, and by the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, as that Clause absorbs and incorporates the guarantee of freedom of press in labor disputes under Executive Order 11491, October 29, 1969, 34 F.R. 17605. You shall therefore return your verdict in favor of the defendants.

Defendants respectfully submit that for the reasons stated and the authorities cited and relied on in their Memorandum In Support Of Affirmative Defenses, filed herewith, this Court is bound to determine and to instruct the jury that on the pleadings, and on the evidence, the published statements complained of may not, in context, constitutionally be construed as statements of fact, except insofar as they truthfully publicize plaintiffs' admitted unique refusal to join or rejoin the Union; that defendants have a constitutional right to publicize their resultant opinions of and feelings about plaintiffs by use of hyperbole, vilification and insulting words, inasmuch as plaintiffs' non-membership substantially injures defendants' important and legitimate economic interests and the ultimate object of the publication was to induce or coerce plaintiffs to join or rejoin the Union; that the designation and descriptions of "scab" in the mailed newsletter, although referring to plaintiffs, were not "addressed," or "directed to" plaintiffs, were not uttered in their presence and were not accompanied by any acts or conduct designed or tending to provoke a violent reaction, and therefore, as a matter of federal constitutional

law, cannot be held to have tended to provoke or incite immediate breach of the peace; and that, as a matter of federal constitutional law, plaintiffs have failed to prove "malice" as that term is correctly defined in the last sentence on page 11 of this Court's opinion letter of January 21, 1971.

If Instruction A is denied or refused, defendants, taking and preserving, and not waiving their objection and exception to such denial or refusal, request the instructions which follow.

INSTRUCTION No. B

The Court instructs the Jury:

You are instructed that defendants Branch 496 of the local level and National Association of Letter Carriers on the national level are the exclusive bargaining representatives of all letter carriers in the Richmond area, non-members as well as members, and that they are required by law to afford equal representation, without discrimination, to non-members and to members of Branch 496.

Letter Opinion, dated January 21, 1971, page 3, top of page.

Executive Order 11491, Section 10(e).

Vaca v. Sipes, 386 U.S. 171, and cases therein cited.

INSTRUCTION No. C

The Court instructs the Jury:

You are instructed that the non-membership of eligible workmen in a labor organization, particularly in a labor organization which is required by law to represent them despite their non-membership therein, is not a matter of purely private concern to the worker who refuses to join or withdraws from the Union, but substantially injures the economic interests of the labor organization, its members, supporters and sympathizers, and is commonly considered traitorous to their interests by such persons.

Rosenbloom v. Metromedia, No. 66, October Term, 1970, decided June 7, 1971, 39 L.W. 4695, 4698-4702, holding the *New York Times* rule applicable to involvement of private individuals in matters of "public or general interest."

As to the scope of "privileged criticism" even prior to *Austin*, the other recent Supreme Court decisions, see *Restatement of Torts*, Ch. 25, § 606, pp. 277-278:

"it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged. The fact that the criticism is fantastic is immaterial, and the extravagant form of its expression is unimportant. It is necessary, however, that the comment have some relation to the facts upon which it is made."

Linn v. Plant Guard Workers, 383 U.S. 53, 65, holding publication arising out of "labor disputes" governed by the *New York Times* rule.

Senn v. Tile Layers, 301 U.S. 468, 478.

Cafeteria Workers v. Angelos, 320 U.S. 293; and other cases cited in Point I of defendants' Memorandum In Support of Affirmative Defenses, holding that workers' refusal to join or withdrawal from a union creates or constitutes a "labor dispute."

Cf. opinion letter, pages 9, 11, last paragraph.

INSTRUCTION No. D

The Court instructs the Jury:

You are instructed that a corollary of the right of a workman to refuse to join or to withdraw from membership in a labor organization is the constitutional right of the labor organization to publish such refusal to their members, supporters and sympathizers for the purpose of inducing them to withdraw their good will, friendship and social companionship; that is, socially to ostracize the non-members.

Such exertion of social and moral pressure for the purpose of inducing, forcing or compelling non-members to join or rejoin the union is not motivated by a malevolent desire to injure and is not actionable.

Organization For A Better Austin, et al, v. Keefe, No. 137, October Term 1970, 39 L.W. 4577, 4578:

"The claim that the expressions were intended to exercise a coercive impact on [plaintiffs] does not remove them from the reach of the First Amendment. [Defendant Branch 496] plainly intended to influence [plaintiffs'] conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider v. State*, 308 U.S. 147 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940). [Defendant Branch 496 was] engaged openly and vigorously in making the public aware of [plaintiffs' non-union membership. That was] offensive to them, as the views and practices of [Branch 496] are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability."

Authorities cited and discussed in defendants' Memorandum In Support Of Demurrer, pages 5-8, and authorities cited following *Coates v. Cincinnati*, in Point I of Defendants' Memorandum In Support Of Affirmative Defenses.

When the object of an "insulting" publication is to induce or coerce the subject to alter his course of conduct in a matter in which the publisher has a legitimate interest, the publication cannot be held to have been made with "a malevolent desire to injure." *Linn v. Plant Guard Workers*, 383 U.S. 53, 64.

"* * * [D]efamatory conduct [does not] suffice[] to remove the constitutional shield." *New York Times v. Sullivan*, 376 U.S. 254, 273.

DIRECT EXAMINATION

The Court instructs the Jury:

You are instructed that Executive Order 11491, signed October 29, 1969, and effective January 1, 1970, guarantees every employee of the Post Office the "right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization and to refrain from any such activity, and each employee shall be protected in the exercise of this right." Section 1(a). The same Section provides that:

"The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization."

Section 2(e) of this Executive Order defines "[l]abor organization" as follows:

"'Labor organization' means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees"

Both management and labor organizations are prohibited by the Executive Order from interfering with, restraining or coercing any employee in the exercise of the right to join or refrain from joining a labor organization, as set forth above. Sections 19(a)(1) and 19(b)(1).

Exclusive power to enforce and protect this right against violations by either management or labor organizations is vested in the Assistant Secretary of Labor for Labor Management Relations. Sections 6(a)(4), 6(b) and 19(d).

Part 203 of the regulations governing "Labor Management Relations in the Federal Service," which became effective February 4, 1970, upon publication in the Federal Register, 35 F.R. 2561, provide exclusive procedures whereby employees aggrieved by claimed unlawful infringement of their right to join or refrain from joining a labor organization may file a complaint and seek redress from the Assistant Secretary of Labor. (LRX 4461-4464b).

Publication by the Union of the fact of non-membership, for the purpose of arousing the antipathy and ill will of Union members, their supporters and sympathizers, leading to social ostracism of non-members, with the object of thereby inducing, "forcing" or "coercing" the non-members to join, is not "interference," "restraint" or "coercion" within the meaning of the Executive Order.

Defendants' Memorandum In Support Of Demurrer, page 2, note 2 and accompanying text; pages 3-4, 6-8.

Appended hereto are the text of the Executive Order and Regulations referred to.

Last paragraph:

Currier, *Defamation in Labor Disputes*, 53 Va. L. Rev. 1, 24, 31-32.

In re *Textile Workers Union*, 123 NLRB 590, 18 L. ed. 1651, 1665.

International Longshoremen's and Warehousemen's Union, 79 NLRB 1487, 1505.

Cambria Clay Products Co., 106 NLRB 267, 277, enforced in part, modified on other issues, 215 F.2d 48 (6 Cir.).

Matter of *Foster-Lothman Mills*, 20 LRRM 1313 (W.E.R.B., 1947).

Nann v. Raimist, 255 N.Y. 307, 318, 174 N.E. 690, 695 (1931).

Wood Mowing & Reaping M. Co. v. Toohey, 114 Misc. 185, 191, 186 N.Y.S. 95, 99 (1921).

INSTRUCTION No. F

The Courts instructs the Jury:

You are instructed that you must consider the meaning of the term "scab" in the context of its publication, in this case in a periodical published by a labor union and distributed to its regular mailing list. A common, indeed often the primary, dictionary definition of "scab," when the word is used in the labor movement, is "a workman who refuses to join a union." If you find that "Carrier's Corner" used the term "scab" in reference to plaintiffs in this sense, and if you find that plaintiffs had in fact refused to join or withdraw from defendant Branch 496, you must find that the representation was true, and you shall therefor return your verdict in favor of the defendants.

First sentence, letter opinion of January 21, 1971, words must be construed "in the circumstances under which they are uttered."

Second sentence, defendants' request for admissions, and/or proof. See, *e.g.*, *Webster's Third New International Dictionary* (G. & C. Merriam Company, 1965), "scab . . . 4:b(1) one who refuses to join a union"; *Webster's New Twentieth Century Dictionary*, unabridged, Second Edition (The World Publishing Company, 1968), p. 1614, "scab, n. . . . 5. in the labor movement, (a) a worker who refuses to join a union, or who works for less pay or under different conditons than those accepted by the union."

INSTRUCTION No. G

The Court instructs the Jury:

If you find that the ultimate object of publishing in "Carrier's Corner" that plaintiffs were "scabs," and in defining that term derogatorily, was to induce, persuade, "coerce" or "force" them to join defendant Branch 496, you shall return your verdict in favor of the defendants.

Organization for a Better Austin v. Keefe, supra; Defendant's Memorandum in Support of Demurrer, pp. 3-11.

INSTRUCTION No. H

The Court instructs the Jury:

If you find that the definition of "scab" published in "Carrier's Corner" is rhetorical; that is, that it consists of epithets, vilifications, similes, metaphors and hyperboles, and that it was written and has been historically and commonly used by labor unions and their members to express their views and feelings that workmen whom the union and its members consider "scabs" should be shunned or ostracized socially, the purpose or object thereof being to force or compel such non-members to join or rejoin the union, or support and act with the union, you shall return your verdict in favor of the defendants.

Organization For a Better Austin v. Keefe, supra;

Cohen v. California, No. 299 this Term, decided June 7, 1971, 39 L.W. 4713;

Defendant's Memorandum in Support of Demurrer, pp. 9-15, particularly, *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 345-348 (5 Cir.), and *R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 270 N.C. 160, 154 S.E.2d 344, 356.

INSTRUCTION No. I

The Court instructs the Jury:

If you find that the definition of "scab" in the "Carrier's Corner" publication complained of had long been attributed to Jack London, a recognized literary artist now deceased, and is designated to characterize or epitomize unionists' opinions of or emotions toward workers whom unionists consider "scabs," even though the words and phrases used are epithets and may be considered offensive or "insulting" by the plaintiff, by other non-unionists, or by the public generally, you are instructed that defendants are entitled to hold and express their opinions and feelings in these terms,

and you shall return your verdict in favor of the defendants.

Cohen v. California, supra, "• • • one man's vulgarity is another's lyric," 39 L.W. 4716, and entire third and second paragraphs from end of opinion. *Ibid*.

Coates v. Cincinnati, No. 117, October Term 1970, 39 L.W. 4630.

Currier, *Defamation on Labor Disputes*, 53 Va. L. Rev. 1, 32.

Restatement of Torts, §606, *supra*.

INSTRUCTION NO. J

The Court instructs the Jury:

Unless you find that the publication complained of was "malicious," as that term is hereinafter defined, you shall return your verdict in favor of defendants. The term "malicious" as used in these instructions does not have reference to any feelings of hostility or ill will against plaintiffs or other non-members of the Union which defendants may have entertained, or to any intent of defendants to injure plaintiffs' reputations or subject them to obloquy, ill will, contempt, ridicule or social ostracism. As a matter of law, a publication is "malicious" only if it is intended to constitute a representation of fact or facts, as distinguished from an expression of feelings, emotions of opinions, and if the representation of fact is actually false, and was known by its maker to be false in fact or was made without regard to concern for its factual truth.

Rosenbloom v. Metromedia, Inc., No. 66, October Term 1970, decided June 7, 1971, 39 L.W. 4694, p. 4697, n. 9 and accompanying text, p. 4702, n. 18 and accompanying text, p. 4703.

Cf. Letter opinion of January 21, 1971, last sentence, page 11.

INSTRUCTION No. K

The Court instructs the Jury:

The burden is on the plaintiffs to prove by clear and convincing evidence that the published definition of "scab" was intended, and would normally be considered in labor circles, to constitute a representation or statement of fact, as distinguished from hyperbole and vituperation, or expressions of opinion or emotion, and that the publication was "malicious," as the word has been defined in an earlier instruction, and unless you find that plaintiffs have met the burden, you shall return your verdict in favor of defendants.

Cohen v. California, supra.

Rosenbloom v. Metromedia, Inc., supra.

INSTRUCTION No. K

The Court instructs the Jury:

Publication and mailing of the "Carrier's Corner" article complained of was not designed to and did not actually incite the plaintiffs or other readers to immediate acts of violence or breach of the peace. You shall return your verdict in favor of the defendants.

Cohen v. California, supra, 39 L.W. 4713, 4714, second column, full paragraph, explicitly hold that the "fighting words" cases like *Chaplinsky v. New Hampshire*, 315 U.S. 568, permit illegalization of "a direct personal insult" only when "addressed to" or "directed to the person of the hearer or hearers," thereby foreseeably provoking an immediate violent reaction from him or them. These cases cannot and do not authorize illegalization of "offensive" or "insulting" words which are *not* "addressed to" the person of the hearer, and are not designed to incite or arouse immediate violent reaction from the persons referred to. Cf. *Coates v. Cincin-*

nati, supra, 39 L.W. 4630, n. 3, and accompanying text, likewise distinguishing cases where insulting words are *spoken directly to* the addresses, and hence may be found likely to provoke immediate violent reaction.

Cohen also expressly distinguishes, at p. 4714, cases where use of offensive or insulting words is coupled with other "separately identifiable" acts or conduct which the state may regulate. 39 L.W. 4714, last full par., 2nd col., last sentence. It was *such independent conduct*—massing of pickets and their concerted shouting of "scab" at those attempting to work—which was held in *Youngdahl v. Rainfair*, 355 U.S. 131, 138, to justify the prohibition. In contrast, here as in *Cohen*, 39 L.W. 4714, the complaint rests exclusively upon the "offensiveness of the words [Branch 496] used to convey its message to the public. The only conduct which the [plaintiffs] seek to punish is the fact of communication. . . . [Virginia] certainly lacks power to punish Branch 496 for the underlying content of the communication."

Reliance on *Youngdahl* in the letter opinion of January 21, 1971, p. 11, third paragraph, is now seen to have been misplaced.

If Instruction L is denied or refused, defendants, taking and preserving and not waiving their objection and exception to such denial or refusal request the following Instruction M.

INSTRUCTION No. M

The Court instructs the Jury:

Unless you find that publication and mailing of the publication complained of created a clear and present danger of inciting immediate breach of the peace, you shall return your verdict in favor of the defendants.

Cohen v. California, supra, 39 L.W. 4715, 4716-4717, prohibits state law censorship of words deemed "offensive" or

"insulting," either on the theory that they are "inherently likely to cause violent reaction" or on the "more general assertion that the States, acting as guardians of public morality, may properly remove . . . offensive word[s] from the public vocabulary."

INSTRUCTION No. N

The Court instructs the Jury:

Plaintiffs cannot recover any damages without proof that they suffered actual monetary loss in consequences of defendants' publication of the item complained of. Plaintiffs cannot recover for mere embarrassment, "nervousness," or psychological pain or suffering. The burden of proving actual monetary loss is on plaintiffs.

"Would the mere announcement by a state legislature that embarrassment and pain and suffering are measurable actionable losses mean that such damages may be awarded in libel actions?" *Rosenbloom v. Metromedia, Inc.*, *supra*, 39 L.W. at 4702. The whole theory that substantial, as distinguished from minimal, damages may be awarded for publications deemed in state law libelous *per se* is contrary to recent controlling Supreme Court decisions.

INSTRUCTION No. O

The Court instructs the Jury:

If you return a verdict in favor of plaintiffs, but find that one or more of the plaintiffs failed to prove substantial actual loss, you shall award such plaintiff only nominal damages. In any event, you shall award only reasonable and not excessive damages.

Rosenbloom v. California, *supra*, 39 L.W. at 4702-4703, n. 19 and accompanying text.

Linn v. Plant Guard Workers, 383 U.S. 53, 64-66.

INSTRUCTION No. P

The Court instructs the Jury:

That defendant Branch 496, although affiliated with defendant National Association of Letter Carriers, is a legal entity separate and distinct from NALC and that it is autonomous local labor organization which conducts its own affairs pursuant to its own bylaws. You are further instructed to find that "Carrier's Corner" is published exclusively by conducts its own affairs pursuant to its own bylaws. You are further instructed to find that "Carrier's Corner" is published exclusively by defendant Branch 496, without any actual participation, supervision or control, or any right of participation, supervision or control thereover, in defendant National Association of Letter Carriers, or any officer or agent of said defendant NALC. You are further instructed that it is not sufficient to hold defendant NALC liable for the article appearing in "Carrier's Corner" that Branch 496 and the International had a joint or common interest in enrolling plaintiffs and other non-unionists as members. Unless you find that plaintiffs have established by clear and convincing evidence that defendant National Association of Letter Carriers, by an authorized agent, actually authorized or participated in publishing the specific article in question, you shall return your verdict in favor of defendant National Association of Letter Carriers.

Rosenbloom v. California, supra, 39 L.W. at 4702-4703.

Mine Workers v. Gibbs, 383 U.S. 715, 736-737, 738-742.

Currier, Defamation in Labor Disputes, 53 Va. L. Rev. 1, 41 (para. at top of page).

The Court's Instructions

INSTRUCTION No. 1

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses and the jury has the right to discard or accept the testimony or any part

thereof of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case; but the jury has no right arbitrarily to disregard the credible testimony of a witness. And in ascertaining the preponderance of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness, his bias, if any; his intelligence; his interest, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proved by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

INSTRUCTION No. 2

A verdict must not be based in whole or in part upon surmise, conjecture or sympathy for any of the parties, but must be based solely upon the evidence and the instructions of the Court.

INSTRUCTION No. 3

The term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the jury. The testimony of one witness in whom the jury has confidence may constitute a preponderance.

INSTRUCTION No. 4

Under the facts and circumstances of these cases, the statements in question were made upon an occasion known in the law as privileged, and the defendants are not liable for making such statements unless the defendants have abused such privilege.

Under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence that the defendant Old Dominion Branch 496, National Association of Letter Carriers AFL-CIO, which was acting as the agent of the defendant The National Association of Letter Carriers AFL-CIO, circulated defamatory statements in June of 1970 with actual malice and that such defamatory statements, if any, caused him damage. You may not award damages for statements made at other times or other occasions.

The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

In determining whether or not the language complained of is insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual construction and common acceptance under the circumstances of this case, that is, in a labor dispute.

The term "actual malice" is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or wilful disregard of the rights of the plaintiff.

In this connection you are told, however, that mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A certain amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law.

If you believe that each plaintiff has proven the above elements by a preponderance of the evidence, you shall find your verdict for the plaintiffs, or plaintiff as the case may be, against both defendants and assess the damages in accordance with the instruction on damages.

If the plaintiffs, or any one or more of the plaintiffs as the case may be, has failed to prove his case by a preponderance of the evidence, you shall find in favor of the defendants in such case or cases.

INSTRUCTION No. 5

If you find that a plaintiff is entitled to recover, then in determining the amount of damages to which he may be entitled, you shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they are expressed, the occasion on which they were published, the extent of their circulation, the probable effect upon those to whose attention they came, and their natural and probable effect upon the particular plaintiff's personal feelings; and if under the other instructions herein he is entitled to recover, you should award him such sum as proven by a preponderance of the evidence by way of damages as will fairly and adequately compensate him for the insult, if any, to him, including any pain and mortification and mental suffering inflicted upon him.

INSTRUCTION No. 6

If you find that a particular plaintiff is entitled to recover, and if you believe from a preponderance of the evidence that the acts complained of were inflicted by actual malice, as defined in another instruction of the Court, such plaintiff may in addition to compensatory damages set forth in Instruction No. 5, recover punitive or exemplary damages against the defendants; that is to say, the jury will not be limited in the amount of its verdict, if any, against the

defendants for any compensatory damages sustained by the particular plaintiff, but the jury may award such plaintiff such further damages against the defendants as they may think right, in view of all the circumstances of the case, as a punishment of the defendants and as a salutary example to others, to deter them from offending in a like manner.

In determining whether the defendants are responsible in punitive damages, the jury should consider the relation of the particular plaintiff and the defendants to each other, the acts of the defendants before and after the alleged use of such insulting words, if any, and all the circumstances surrounding them.

INSTRUCTION No. 7

You are told that the form of your verdict shall be as follows:

1. If you find in favor of the plaintiff, and award him compensatory damages only, your verdict should be:

We, the jury, on the issued joined find in favor of the plaintiff and assess his compensatory damages at \$_____.

2. If you find in favor of the plaintiff, and award him compensatory damages and punitive damages, the form of your verdict shall be as follows:

We, the jury, on the issue joined find in favor of the plaintiff and assess his compensatory damages at \$_____, and his punitive damages at \$_____, or a total of \$_____.

3. If you find your verdict in favor of the defendants, the form of your verdict shall be:

We, the jury, on the issue joined find in favor of the defendants.

NOTE: THE JUDGMENTS ENTERED IN ALL THREE CASES WERE SUBSTANTIALLY IDENTICAL TO THE ONE REPRODUCED BELOW.

[Caption omitted in printing]

Judgment

This day came again the parties, by their attorneys, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and having fully heard the argument of counsel were sent out of Court to consult of a verdict, and after some time returned into Court with a verdict in the words and figures following, to-wit: "We, the Jury, on the Issues Joined Find in Favor of the Plaintiff and Assess His Compensatory Damages at \$10,000.00 (Ten Thousand) and His Punitive Damages at \$45,000.00 (Forty-Five Thousand) or a Total of \$55,000.00 (Fifty-Five Thousand)."

Thereupon the defendants, by their attorney, moved the Court to set aside the verdict of the jury and enter final judgment in their favor, or in the alternative to award them a new trial on all issues, on the grounds that the verdict is contrary to the law and the evidence, for misdirection of the jury by the Court because the verdict is excessive, and, for other errors committed by the Court during the course of the trial as noted in the Reporter's Transcript of the evidence, which motions the Court doth overrule.

Therefore, it is considered by the Court that the plaintiff recover of the defendants the sum of Fifty-Five Thousand Dollars with interest thereon to be computed after the rate of six per centum per annum from the 2nd day of July, 1971, until paid, and his costs by him about his suit in this behalf expended.

To which action of the Court the defendants, by their respective attorneys, objected and excepted.

And the defendants having indicated their intention to petition the Supreme Court of Appeals of Virginia for a writ of error from and supersedeas to this judgment, it is

ordered that execution thereon be suspended for a period of four months from this date, and thereafter, if such petition be filed within said time, until the Supreme Court of Appeals of Virginia shall have acted on said petition provided the defendants or someone for them shall within thirty days from this date give a bond in the penalty of Seventy Thousand Dollars, with surety to be approved by the Clerk, conditioned accordingly to Sections 8-465 and 8-477 of the Code of Virginia of 1950, as amended

A Copy,

Teste: LUTHER LIBBY, JR., Clerk.

By /s/ JEAN B. FAYBIE, D.C.

Parker E. Cherry

and

Stephen M. Kapral, p.q.

Costs: \$41.25

[Caption Omitted in Printing]

Notice of Appeal and Assignments of Error

Defendants, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby note their respective appeals from the final judgment order entered against them, and each of them by this Court in the above-entitled action on July 2, 1971, and state their intention to file petition for writ of error in the Supreme Court of Virginia.

OLD DOMINION BRANCH No. 496,
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO and
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO
Of Counsel

By

Assignments of Error

Defendants assign the following as errors of the Trial Court:

1. The Court erred in overruling demurrer filed by both defendants to plaintiff's Motion for Judgment.

2. The Court erred in overruling motions made by counsel for both defendants to strike plaintiff's evidence and to enter summary judgment in favor of the respective defendants when plaintiff rested his case.

3. The Court erred in overruling motions made by counsel for both defendants to strike plaintiff's evidence and to enter summary judgment in favor of the respective defendants after all parties had rested.

4. The Court erred in granting any instructions requested by plaintiff.

5. The Court erred in submitting to the jury any instructions which would have permitted the jury to find its verdict against either defendant.

6. The Court erred in giving the Jury Instructions Numbers 3, 4, 5, 6, and 7.

7. The Court erred in refusing each and every instruction submitted on behalf of the defendants.

8. The Court erred in failing to grant any of the instructions offered on behalf of the defendants, Instructions "A" through "P", inclusive.

9. The Court erred in refusing to permit Executive Order, Defendant's Exhibit "A", to go to the jury.

10. The Court erred in permitting Cynthia Ziegengeist to testify on behalf of the plaintiffs.

11. The Court erred in overruling motions on behalf of both defendants to set aside the verdict of the jury and

enter summary judgment in favor of the respective defendants, or to grant a new trial.

12. The Court erred in overruling motion on behalf of the defendants to grant a remittitur.

OLD DOMINION BRANCH No. 496,
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

By
Of Counsel

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

By
Of Counsel

Mozart C. Ratner
818 Eighteenth Street
Washington, D.C. 20006

Israel Steingold
819 Citizens Bank Building
Norfolk, Virginia 23514

Counsel for Defendants

Supreme Court of the United States

No. 72-1180

**Old Dominion Branch No. 496, National
Association of Letter Carriers, AFL-CIO,
et al.,**

Appellants,

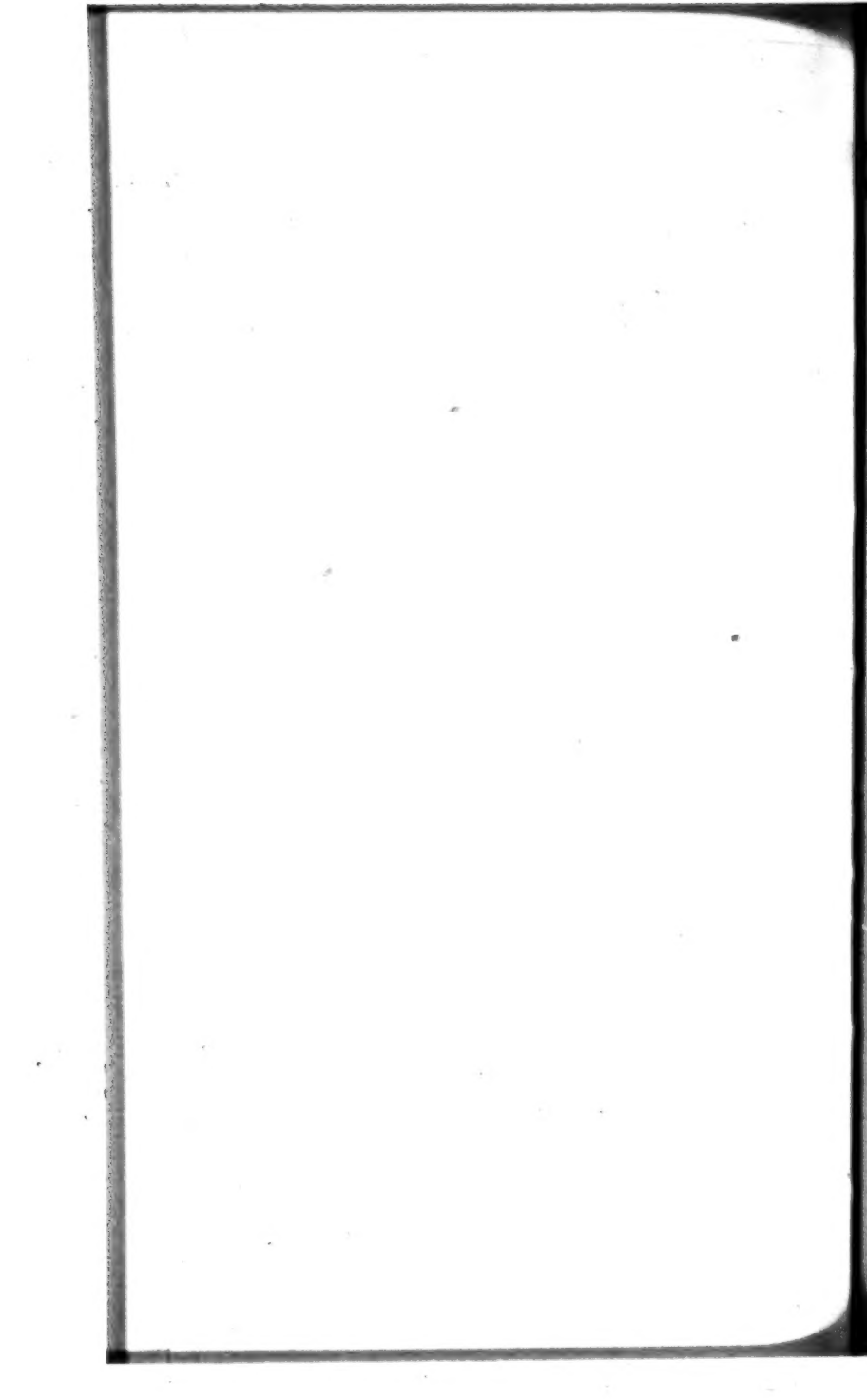
v.

Henry M. Austin, et al.

APPEAL from the Supreme Court of the Commonwealth of Virginia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument in tandem with No. 72-617.

May 29, 1973



FILE COPY

FILED

FEB 28 1973

MICHAEL ROSAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. **72-1180**

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, *Appellants*,

v.

HENRY M. AUSTIN, L. D. BROWN, and
ROY P. ZIEGENGEIST, *Appellees*.

On Appeal from a Judgment of the Supreme Court
of Virginia

JURISDICTIONAL STATEMENT

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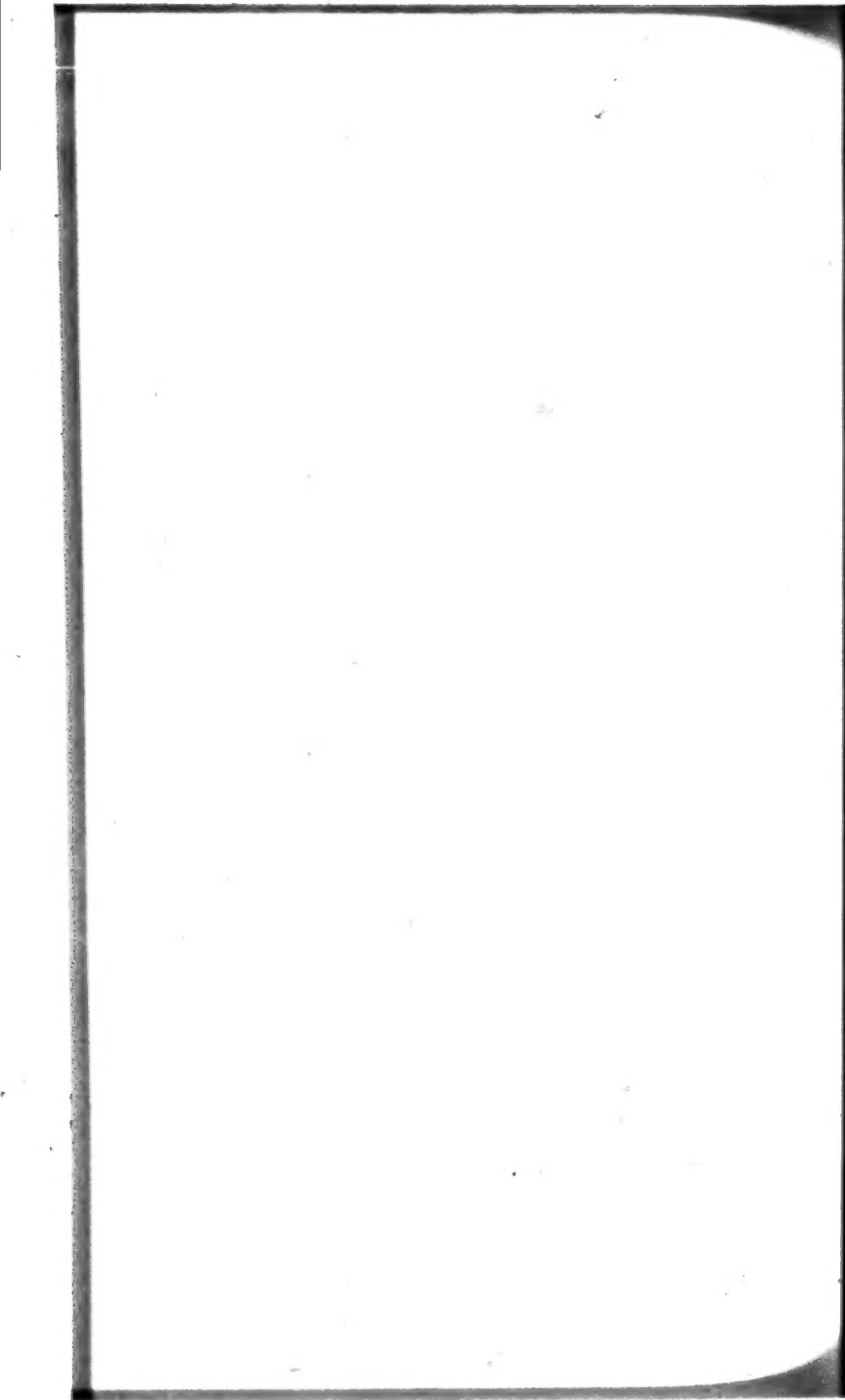


TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
A. The Facts	3
B. The Proceedings in the Trial Court	5
C. The Decision Below	8
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	9
1. The Statute as Authoritatively Construed Is Un- constitutionally Overbroad and Vague	9
(a) Overbreadth	9
(b) Vagueness	12
2. The Statute as Applied Is Unconstitutional Be- cause the Publication Penalized Thereunder Is Protected by the First Amendment	13
3. Holding the Defamation Actionable Under the Virginia Statute Overstepped the Limits Imposed by Federal Labor Law	20
4. The Damage Award was Excessive	21
CONCLUSION	22
APPENDIX A	1a
APPENDIX B	12a
APPENDIX C	34a

AUTHORITIES CITED

CASES:	Page
<i>AFL v. Swing</i> , 312 U.S. 321 (1941)	13
<i>American Steel Foundries v. Tri-City Central Trades Council</i> , 257 U.S. 184 (1921)	17
<i>Bakery Drivers' Local v. Wohl</i> , 315 U.S. 769 (1942) ..	13
<i>Beckley Newspapers v. Hanks</i> , 389 U.S. 81 (1967)	21
<i>Cafeteria Employees' Union v. Angelos</i> , 320 U.S. (1943)	11, 14, 19
<i>Cambria Clay Prods. Co.</i> , 106 NLRB 267 (1953), enf'd in part and remanded on other grounds, 215 F.2d 48 (6th Cir. 1959)	16
<i>Cantwell v. Connecticut</i> , 309 U.S. 626, 310 U.S. 296 (1940)	23
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942) ...	11
<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971)	11, 12, 13
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	11, 14
<i>Cox v. Louisiana</i> , 379 U.S. 536 (1965)	11
<i>Curtis Publ. Co. v. Birdsong</i> , 360 F.2d 344 (5th Cir. 1966)	15
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1962)	11
<i>Excelsior Underwear</i> , 156 NLRB 1236, approved on other grounds, <i>Wyman Gordon Co. v. NLRB</i> , 394 U.S. 759 (1969)	18
<i>Farkas v. Texas Instrument, Inc.</i> , 375 F.2d 629 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967)	20
<i>Farmer v. Philadelphia Elec. Co.</i> , 329 F.2d 3 (3d Cir. 1964)	20
<i>Gertz v. Robert Welch, Inc.</i> , 41 U.S.L. Week 2104 (7th Cir., decided Aug. 1, 1972), cert. granted, 41 U.S.L. Week 3441 (No. 71-617, Feb. 20, 1973)	18
<i>Gnotta v. United States</i> , 415 F.2d 1271 (8th Cir. 1969)	20

Table of Contents Continued

iii

	Page
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	9, 11, 15, 22
<i>Greenbelt Cooperative Publ. Ass'n v. Bresler</i> , 398 U.S. 6 (1970)	13, 15, 18, 19
<i>Gulfcoast Trans. Co. v. NLRB</i> , 332 F.2d 28 (5th Cir. 1964)	16
<i>Henry v. Collins</i> , 380 U.S. 356 (1965)	21
<i>Linn v. Plant Guard Workers</i> , 383 U.S. 53 (1966) ..	3, 8, 9, 15, 16, 19, 20, 21, 22
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	13
<i>NLRB v. Fruit & Veg. Packers</i> , 377 U.S. 58	13
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	17
<i>New York Times v. Sullivan</i> , 376 U.S. 259 (1964) ..	3, 8, 9, 13, 14, 16, 18, 20, 21, 22
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	14, 15, 17, 18, 19
<i>Prudential Ins. Co. v. Cheek</i> , 259 U.S. 530 (1922)	23
<i>Retail Clerks v. Schermerhorn</i> , 375 U.S. 96 (1963)	17
<i>Rosenbloom v. Metromedia</i> , 403 U.S. 29 (1971) .	16, 17, 18, 22
<i>Senn v. Tile Layers' Union</i> , 301 U.S. 468 (1937)	14
<i>Terminello v. Chicago</i> , 337 U.S. 1 (1949)	2, 11
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967)	17
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	13, 14, 16
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	13, 14, 16
<i>Youngdahl v. Rainfair</i> , 355 U.S. 131 (1957)	11
STATUTES:	
28 U.S.C. § 1257(2)	2, 23
28 U.S.C. § 2103	23
29 U.S.C.A. §§ 151, 158(a)(1), (3), (b)(1)(A), (7), (c), (1965)	17

	Page
39 U.S.C.A. §§ 1201-1209	4
Postal Reorganization Act, 84 Stat. 719 (1970), 39 U.S.C.A. § 101, <i>et seq.</i> (1972 Supp.)	4
Sections 10, 15a, 84 Stat. 784, 787 (1970)	4
Executive Order 11491, 34 Fed. Reg. 17,605 (1969) 3, 4, 16, 17	
Ala. Code Title 14, § 11 (1959)	13
Ky. Rev. Stat. Ann. § 437-020 (1969)	13
Louisiana Rev. Stat. Ann. §§ 14:103, 14:103.1 (1972 Supp.)	13
1942 Miss. Code Ann. § 1059 (1957)	13
Virginia Code § 8-630 (1957)	2, 3, 6, 12
§§ 40.1-58-40.1-69	17
Code of West Va. § 55-7-2 (1946)	13
MISCELLANEOUS:	
Currier, <i>Defamation In Labor Disputes: Preemption and The New Federal Common Law</i> , 53 Va. L. Rev. 1 (1967)	22
Webster's Third New International Dictionary	4
Webster's New Twentieth Century Dictionary, Second Edition (The World Pub. Co., 1968), p. 1614	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No.

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, *Appellants*,

v.

HENRY M. AUSTIN, L. D. BROWN, and
ROY P. ZIEGENGEIST, *Appellees*.

On Appeal from a Judgment of the Supreme Court
of Virginia

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Virginia entered on November 27, 1972, affirming three judgments awarding a total of \$165,000 in damages against appellants for publication of certain matter in the June, 1970, issue of the monthly newspaper of appellant Old Dominion Branch No. 496. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Virginia Supreme Court, Appendix A to this Statement, is reported at 192 S.E. 2d 737. It has not yet been published in the official reports.

JURISDICTION

Appellees' cause of action and the judgment below were based upon Va. Code § 8-630 (1957), Virginia's "insulting words" statute, p. 3, *infra*. In their answer, and at every subsequent step of the proceedings in the trial court and in the court below, appellants contended that the statute on its face, as construed, and as applied to the facts herein conflicts with the United States Constitution and Executive Order 11491. The courts below rejected those contentions (App. A, *infra*, pp. 5a, 7a, 8a, 9a, 10a-11a).¹ The judgment below was entered on November 27, 1972, and the Notices of Appeal (*infra*, pp. 34a-36a) were filed on December 20, 1972. Jurisdiction to review the decision below by direct appeal is conferred upon this Court by 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Whether a state statute which, as authoritatively construed, makes "insulting words" actionable, without a showing of immediate danger of breach of the peace, if the words are uttered with "actual malice," defined as "hostility," is unconstitutional for overbreadth and vagueness.

¹ The court below neglected to mention that appellants attacked the statute as unconstitutional not only "on its face" but also as construed by the trial court and applied to the facts of this case (A. 16, 49, 81-82; Tr. 236, Appellant's Brief to the court below, p. 3, questions). *Terminello v. Chicago*, 337 U.S. 1, 5-6 (1949). "A" refers to the Appendix to the briefs filed in the court below; "Tr." refers to the transcript of the proceedings in the trial court.

2. Whether *New York Times v. Sullivan*, 376 U.S. 254 (1964), bars application of the statute to a union publication which identifies nonmembers as "scabs" and defines "scab" in pejorative terms, for the purpose of inducing the nonmembers to join.

3. Whether *New York Times v. Sullivan* controls the application of a state defamation statute to a labor dispute governed by federal law.

4. Whether an award of compensatory and punitive damages against the unions totaling \$165,000, for publishing the matter in question, is "excessive" within the meaning of *Linn v. Plant Guard Workers*, 383 U.S. 53, 65-66 (1966), and therefore barred by Federal labor law.

STATUTES INVOLVED

Code of Va. § 8-630 (1957) provides: "Action for insulting words.—All words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace shall be actionable."

The relevant provisions of Executive Order 11491, 34 Fed. Reg. 17,605 (1969), are set out in Appendix B hereto.

STATEMENT

A. The Facts.

Appellant Old Dominion Branch No. 496 (Branch) is an autonomous local union affiliated with appellant National Association of Letter Carriers, AFL-CIO (NALC). Under Executive Order 11491, and, subsequently, the Postal Reorganization Act and the National Labor Relations Act, the postal authorities at all relevant times have recognized NALC as the national and Branch as the local exclusive collective bargaining representative of city letter carriers in the

Richmond area.² During the period relevant herein, appellees were city letter carriers whom appellants represented under compulsion of the Executive Order. But appellees were "free riders": they were nonmembers who paid no dues or fees to either Branch or NALC.³

Without the knowledge or sanction of any officer or agent of NALC, in an effort to induce nonmembers like appellees to join, Branch from time to time published the names of nonmembers (including appellees) under the heading "List of Scabs" in the Branch's monthly newsletter.⁴ The newsletter is distributed by mail to Branch members only (Tr. 76). In the June, 1970, issue, Branch printed above the "List of Scabs" a well known piece of trade union literature, generally thought to have been written by Jack London, explaining in

² Under the Postal Reorganization Act, 84 Stat. 719 (1970), 39 U.S.C.A. § 101 et seq., (1972 Supp.), certain provisions of the Postal Reorganization Act and the National Labor Relations Act superseded the cited Executive Order. See 39 U.S.C.A. §§ 1201-1209; Postal Reorganization Act §§ 10, 15a, 84 Stat. 784, 787 (1970). Appellants' representative status and the rights of employees established by the Executive Order remain in effect under the Postal Reorganization Act and contracts negotiated pursuant thereto.

³ Neither the Executive Order nor the Postal Reorganization Act permits contracts making union membership a condition of employment. Executive Order 11491, § 12(c), *infra*, p. 25a; 39 U.S.C.A. § 1209(c) (1972 Supp.).

⁴ The record shows that, in labor parlance, a "scab" is a non-member. (Tr. 163-164). See, e.g., Webster's Third New International Dictionary "scab," 4:b(1) ("one who refuses to join a union"); Webster's New Twentieth Century Dictionary, unabridged, Second Edition (The World Pub. Co., 1968), p. 1614.

highly uncomplimentary terms "what a scab is."⁶ (App. A, *infra*, pp. 2a-3a). The June issue was posted on a station bulletin board (App. A, *infra*, p. 3a). There is no evidence that anyone other than a letter carrier saw it there.

B. The Proceedings in the Trial Court.

Appellees filed complaints for damages in the Law and Equity Court of the City of Richmond, Virginia. Appellants filed demurrers, arguing that the publication complained of is protected against state court

⁶ The explanation of the meaning of the term "scab" is as follows:

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following:

'After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

'A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

'When a scab comes down the street, men turn their backs and angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

'No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

'Esau was a traitor to himself, Judas was a traitor to his God, Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class!'"

damage suits by the freedom of speech guarantee of the United States Constitution and by federal labor law. The demurrers were overruled in an opinion holding that the suit was governed by the Virginia "insulting words" statute, Code of Va., § 8-630, and that the statute, as applied to the challenged publication, is constitutional. Defendants thereafter filed timely answers (A. 12, 17), affirmatively asserting, *inter alia*, constitutional defenses predicated upon the First and Fourteenth Amendments and the Supremacy Clause of the United States Constitution, and explicitly pleading that the Virginia statute for insulting words "on its face and as construed and applied to the complaint herein in the letter opinion of the Court dated January 21, 1971 [overruling the demurrer]" is void for overbreadth and vagueness. On the basis of these defenses, the defendants, at the close of plaintiffs' evidence and again at the close of all evidence, moved the court to strike plaintiffs' evidence and enter judgment for defendants. These motions were overruled. (A. 38-39, 46).

At trial, appellee Austin testified that after the article appeared some of his co-workers stopped speaking to him and otherwise manifested hostility toward him, and that one postal worker's wife called him a "scab" (Tr. 101-103). Seven months after the article appeared, he testified, he got a migraine headache. (Tr. 103). Another appellee, Brown, testified that the article upset him, that he had headaches, and that some of his co-workers called him "scab" and other names (Tr. 149-150). The third appellee, Ziegengeist, testified that after the publication some of his co-workers became "cool" towards him (Tr. 130). His teenage daughter also testified that after "the case came up" she feared someone might come and harm "us" and that Ziegen-

geist and his wife had many arguments (Tr. 143, emphasis added). There was no other evidence of injury. (App. A, *infra*, 3a-4a.)

The trial court instructed the jury that the occasion on which the statements in question had been made was privileged; that plaintiffs were therefore liable only if they had "abused" the privilege by making "defamatory" statements with "actual malice;" that statements are defamatory and libellous if they contain "words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace," and that "actual malice" means having been "actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff." (App. A, *infra*, pp. 9a-10a) ⁶ No cautionary instruction was given as to the amount of damages. Defendants took appropriate objections and exceptions. (A. 46-54).

The jury returned a verdict awarding each of the appellees \$10,000 in compensatory damages and \$45,000 in punitive damages. Appellants then moved for

⁶ (A. 76-77). The court denied defendants' request for an instruction defining a malicious publication as one intended "to constitute a [false] representation of fact or facts, as distinguished from an expression of feelings, emotions or opinions, and . . . known by its maker to be false, in fact or . . . made without regard or concern for its factual truth." The court explained to counsel that, under Virginia law, hyperbole and statements of opinion, no less than statements of fact, are actionable (A. 48-49, 70-71).

The court below conceded (App. A, *infra*, pp. 10a-11a), that appellants properly took and preserved their objection to the trial court's rejection of the *New York Times* principles.

judgment N.O.V., for a new trial, and for a remittitur. These motions were denied. (A. 55-56).⁷

C. The Decision Below.

On appeal, the Supreme Court of Virginia rejected appellants' claims that the insulting words statute, on its face and as here applied, violated appellants' right to freedom of speech; that adoption of the *New York Times v. Sullivan*, 376 U.S. 254, 285, standards in *Linn v. Plant Guard Workers*, 383 U.S. 53, 65 (1966), "to effectuate the statutory design with respect to pre-emption" governed appellees' suit; that the above described instructions with respect to "defamation," "malice" and burden of proof did not conform to those standards; that the statute as so applied conflicted with *Gooding v. Wilson*, 405 U.S. 518 (1972); and that the damage award was clearly excessive under *Linn, supra*, 383 U.S. at 65, 66.

The court held that the Virginia insulting words statute had been narrowed by state court decisions making the common law rules of slander applicable to actions under the statute, so that defamatory words, if uttered on a privileged occasion, are actionable only upon a showing of "actual malice", as defined by the trial court (p. 7 *supra*). (App. A *infra*, pp. 5a, 10a). The court declared that where the defamatory statement "was made with actual malice" the "public interest in free expression and communication of ideas" does not "outweigh [] the interest of the State in protecting the individual plaintiff from damage to his reputation and social relationships" (App. A, *infra*,

⁷ Proceedings in a suit filed by another employee whose name appeared in the June, 1970 newsletter have been held in abeyance by stipulation pending the outcome of this appeal.

p. 5a). In the court's view, since the Virginia statute condemns "privileged" statements only if made with "actual malice" it reaches "only those words that are not protected by the First Amendment" (App. A, *infra*, p. 5a).

The court also held that the *New York Times* definition of "actual malice" was inapplicable because that definition extends only to publication of matters of "general or public interest." (App. A, *infra*, p. 8a). The court reasoned that since plaintiffs had a right, under both federal and state law, not to join the union, their refusal to join "was only a private matter and an issue of general concern or public interest was not involved." (*Ibid.*) The court found *Linn v. Plant Guards*, *supra*, support for its position, quoting its cession to state courts of power to award damages for "malicious utterance of defamatory statements" in labor disputes (App. A, *infra*, p. 7a). But the court did not mention *Linn's* adoption by analogy of the *New York Times* definition of "actual malice", and ignored its holding that State power to award damages for defamatory statements in labor disputes is bounded by the *New York Times* standards and that damages must not be excessive.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. THE STATUTE AS AUTHORITATIVELY CONSTRUED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

(a) Overbreadth

Gooding v. Wilson, 405 U.S. 518 (1972), establishes the unconstitutional overbreadth of the Virginia statute upon which the judgment below was rendered. The Virginia statute makes actionable "all [written or spoken] words which from their usual construction

and common acceptance are construed as insults and tend to violence and breach of the peace” The Georgia statute struck down in *Gooding* provided that “any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.” 405 U.S. at 519. The similarity between the statute involved in *Gooding* and the one at issue here is fatal to the latter’s constitutionality. Words which “are construed as insults and tend to violence and breach of the peace” are precisely equivalent to “opprobrious words or abusive language, tending to cause a breach of the peace.”

To the extent that the two statutes differ on their face, that of Virginia is broader and therefore more suspect constitutionally. On its face, the Georgia statute prohibited only opprobrious words spoken to or of another “*in his presence.*” It could be argued, therefore, as the appellee and the dissenting Justice did, 405 U.S. at 522-23, 528, that the “opprobrious words and abusive language * * * prohibited are [only] those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, and in his presence, naturally tend to provoke violent resentment, * * * [i.e.] ‘fighting words.’ ” No such argument can be advanced for the Virginia statute, however, for it reaches written words, which are not used “in the presence” of the subject, and which are incapable of provoking an immediate violent response against the writer.

The fact that a Georgia court had construed “tendency to cause a breach of the peace” to reach “future”

assaults led this Court to conclude that the Georgia statute unconstitutionally encompassed "utterances when there was no likelihood that the person addressed would make an immediate violent response." 405 U.S., at 528. The defect which came into the Georgia statute by construction appears in the very terms of the Virginia statute, and has not been eliminated by interpretation. Consequently, the statute is unconstitutional on its face and as construed. *Gooding, supra*; *Terminello v. Chicago*, 337 U.S. 1 (1949); *Cohen v. California*, 403 U.S. 15, 25-26 (1971). Cf. *Edwards v. South Carolina*, 372 U.S. 229, 237 (1962); *Cox v. Louisiana*, 379 U.S. 536, 551-552 (1965); *Coates v. Cincinnati*, 402 U.S. 611 (1971). Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (statute construed to be applicable only to "face-to-face" words likely to cause an immediate breach of peace by addressee held constitutional) with *Cafeteria Employees' Union v. Angelos*, 320 U.S. 293 (1943) (pickets insulting customers by calling them "unfair" and "fascist"; held hyperbole, not enjoined absent imminent threat of violence).⁶

⁶ *Youngdahl v. Rainfair*, 355 U.S. 131 (1957), is in accord with this analysis. There, upon findings that mass picketing marked by threats of violence and name calling in unison (including cries of "scab") was calculated to provoke immediate violence and was likely to do so unless promptly restrained, this Court sustained an injunction against the name calling. As we have seen, the Virginia Statute is not limited to calculated provocation of immediate violence or utterances creating an imminent danger thereof. Nor did the instructions given the jury (p. 7, *supra*; *infra*, pp. 9a-10a) or the prior decisions of the court below have the effect of so narrowing the statute. There was no evidence that distribution of appellant's newsletter was calculated to cause or did cause any violence at any time.

(b) Vagueness

In addition to being overbroad, the statute as here construed is void for vagueness. The statute does not define the "insults" which it renders actionable, but refers instead to "usual construction and common acceptance," and to "tendency to violence and breach of the peace." So referenced, "insult" is no less subject to varying individual definition than "annoy," which in *Coates v. City of Cincinnati*, 402 U.S. 611, 612-614, this Court held specifies "no standard of conduct at all".

The court below said that the "construction and limitations" (App. 5a, *infra*), it placed upon Code § 8-630 restrict its reach to "those words which are not protected by the First Amendment" (*Ibid.*). On the contrary, they add confusion to its unconstitutional vagueness. The jury was instructed (App. A, *infra*, p. 9a) that the statements complained of were to be considered "defamatory and libelous" if they are commonly construed as "insults and tend to violence and breach of the peace." However, the jury was also told that

"mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A *certain* amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law." (Emphasis added.) (App. A, *infra*, p. 10a)

This construction and application of the statute, upheld by the court below, leaves at large not only the question of what language is "insulting," but also *what* "amount of vulgar name calling, indicating hos-

tility or ill will", under the circumstances of this case, is tolerated by Virginia law. As to this, the jury was left free to speculate and to predicate its conclusion on its own prejudices and notions of social policy. Given this latitude, no speaker or writer can predict what language may subject him to liability. Since this statute operates directly in the area of First Amendment freedoms, the statute is unconstitutionally vague. *Coates v. Cincinnati*, 402 U.S. 611 (1971); *NAACP v. Button*, 371 U.S. 415, 432-433, 437-438 (1963). Cf. *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 11 (1970).⁹

2. THE STATUTE AS APPLIED IS UNCONSTITUTIONAL BECAUSE THE PUBLICATION PENALIZED THEREUNDER IS PROTECTED BY THE FIRST AMENDMENT

The court below erred in holding, in the face of *New York Times v. Sullivan*, 376 U.S. 254 (1969) and its progeny, that the Virginia statute could constitutionally be applied to permit recovery for the "insulting words" printed here. Landmark decisions of this Court¹⁰ establish that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution * * *," *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940), and that refusal

⁹ At least five other states penalize insulting words or make them actionable by statute. Ala. Code Tit. 14 § 11 (1959); Ky. Rev. Stat. Ann. § 437-020 (1969); Code of W. Va. § 55-7-2 (1946); Louisiana Rev. Stat. Ann. §§ 14:103, 14:103.1 (1972 Supp.); 1942 Miss. Code Ann. § 1059 (1957). None of the statutes define the term "insulting."

¹⁰ E.g., *AFL v. Swing*, 312 U.S. 321 (1941); *Bakery Drivers' Local v. Wohl*, 315 U.S. 769 (1942); *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940). Cf. *NLRB v. Fruit & Veg. Packers*, 377 U.S. 58, 76 (Black, J., concurring).

of eligible workers to join a union is a "labor dispute." *Senn v. Tile Layers Union*, 301 U.S. 468, 478 (1937). The identity of the parties, here the nonmembers, is "information concerning the facts of a labor dispute . . .," *Thornhill, supra*, and the union has a legitimate interest in disseminating that information to its members and to the public so that they may individually and collectively persuade and use social pressure to induce nonmembers to join. Cf. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 416, 419 (1971); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943).

First Amendment protections are not lost because a speaker (here the union) uses strong language. The dissemination of opinion, in however emotive a form, for the purpose of exerting peaceful pressure upon adversaries in a labor dispute, is beyond the power of the State to suppress.¹¹ See *Thornhill, supra*, 310 U.S. at 104; *Thomas v. Collins*, 323 U.S. 516, 537 ("Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts."); *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 417, 419 (1971); *Cohen v. California*, 403 U.S. 15 (1971); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 295 (1943). In *Cohen, supra*, this Court said (403 U.S. at 25-26):

"... we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative

¹¹ Damage actions, especially those resulting in large verdicts like the one here, have a more chilling effect upon communication of ideas and opinions than many criminal statutes. *New York Times v. Sullivan*, 376 U.S. 259, 277-279 (1969). See also *id.* at 265-266 (Award of damages is "state action" within the reach of the Fourteenth Amendment).

function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words often are chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

In the labor dispute context, "the most repulsive speech enjoys immunity, provided it falls short of a deliberate or reckless untruth." *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966).¹² "[S]o long as the means are peaceful, the communication need not meet standards of acceptability." *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Unless an immediate danger of breach of the peace is created, the use of words, however "insulting," which truthfully convey the speaker's thoughts or emotions about conduct offensive to him are protected by the First Amendment. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Greenbelt Cooperative Pub. Assn. v. Bresler*, 398 U.S. 6 (1970) (description of appellee's negotiating position as "blackmail" entitled to constitutional protection). Cf. *Curtis Publ. Co. v. Birdsong*, 360 F.2d 344, 345 (5th Cir. 1966) (calling state highway policemen "bastards" privileged).

The "insulting" aspect of the publication performs a special function in the context of an organizing campaign. It is designed to make known to the nonmem-

¹² "[I]n labor disputes, both sides are masters of the arts of villification, invective and exaggeration." *Id.* at 67-68 (Black, J., dissenting on other grounds).

bers the revulsion which their alienation creates among their fellow workers, and to persuade them to join to avoid being known as "scabs." If, in consequence, the nonmembers join, the strength and solidarity of the Union will be increased and the burden of carrying "free riders" will be lessened or lifted. In addition, shared aversion to the nonmembers' conduct helps solidify the members' fealty to the union. Speech for these purposes is plainly protected by the First Amendment. *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).¹³

We assume *arguendo* with the court below (App. A, *infra*, p. 8), that speech addressed to *purely* private matters is not protected by the First Amendment and that such speech is not protected by the restrictions on common law defamation announced in *New York Times v. Sullivan*, *supra*.¹⁴ But the extensive Presi-

¹³ The same result obtains under the Supremacy Clause. (See pp. 20-21, *infra*.) The relationship of the parties was governed by Executive Order 11491, which is binding on the States under the Supremacy Clause (see p. 20, *infra*). Section 1 of that Executive Order is identical to § 7 of the National Labor Relations Act. As this Court observed in *Linn v. Plant Guard Workers*, 383 U.S. 53, 61, the National Labor Relations Board (which, of course, has primary jurisdiction to construe the NLRA) has repeatedly held that "epithets such as 'scab', 'unfair', and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements . . . defame one of the parties to the dispute." Circulation of the definition of "scab", held actionable herein, is also protected by the NLRA. *Cambria Clay Prods. Co.*, 106 NLRB 267, 273 (1953), *enforced in part and remanded on other grounds*, 215 F.2d 48 (6th Cir. 1959). See also *Gulfcoast Trans. Co. v. N.L.R.B.*, 332 F.2d 28, 30-31 (5th Cir. 1964).

¹⁴ But see *Rosenbloom v. Metromedia*, 403 U.S. 29, 48, n. 17 (1971).

dential, judicial, administrative and Congressional regulation surrounding employee exercise of the right to join or refrain from joining labor unions,¹⁵ as well as the First Amendment labor cases cited *supra*, p. 13, surely demonstrate, contrary to the holding below, that speech aimed at influencing employees' membership decisions is addressed to a matter of public or general, not merely private, concern, especially within the community of affected employees who saw the publication in issue. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 42 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 387-388 (1967); *American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184, 208-210 (1921). For similar reasons, the court below erred insofar as its decision may be read as holding that exercise of the right to abstain from union membership is protected by a right of privacy against publications pointedly, but peacefully, designed to induce employees to join up. See *Organization for A Better Austin v. Keefe*, 402 U.S. 415, 419;¹⁶ *Rosenbloom v. Metromedia*, *supra*; *Ex-*

¹⁵ *E.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580-583, 601-610 (1969); National Labor Relations Act §§ 1(a), 8(a)(1), (3)(b)(1)(A), (7), 8(c) 29 U.S.C.A. §§ 151, 158(a)(1), (3), (b)(1)(A), (7), (c) (1965); Executive Order 11491, §§ 1(a), 19(a)(1), (b)(1), (c).

¹⁶ In *Keefe*, *supra*, the state court thought that because the real estate broker had a legal right to buy and sell property in the manner he did, that right could constitutionally be protected against publications "intended to exercise a coercive impact on" him to change. This Court reversed.

Insofar as the court below may have rested its "right of privacy" theory on Virginia's "Right to Work" law (Code of Virginia §§ 40.1-58 to 40.1-69), it obviously erred. Section 14(b) of the National Act, without which state right to work laws could not operate, permits the states to protect the "right to work" only against contracts which make union membership a condition of employment. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 104-105 (1963).

celsior Underwear, 156 NLRB 1236, 1242-44 (1966), *approved on other grounds*, *NLRB v. Wyman Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, *New York Times v. Sullivan*, 376 U.S. 254 (1964) applies and precludes recovery for the dissemination of fact and opinion here in issue. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).¹⁷ There is no evidence and no finding that the published statements were untrue. "On the contrary, even the most careless reader must have perceived that the word[s] used [were] no more than rhetorical hyperbole, vigorous epithet[s] used by those who considered [appellees'] . . . position extremely unreasonable." *Greenbelt Cooperative Publ. Ass'n., Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Indeed, the record is completely devoid of evidence that anyone in the postal station or anywhere else thought appellees had "water brains" or combination "backbone[s] of jelly and glue." See *Greenbelt, supra*. Here, the individuals identified as "scabs," were, indeed, "scabs." "To permit the infliction of financial liability upon appellants for publishing these . . . articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Greenbelt, supra*, at

¹⁷ *Rosenbloom* holds that "if a matter is a subject of public or general interest, it cannot become less so merely because a private individual is involved, or because in some sense the individual did not voluntarily become involved. The public's primary interest is in the event, the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior notoriety or anonymity." 403 U.S. at 43. Cf. *Gertz v. Robert Welch, Inc.*, 41 U.S.L. Week 2104 (7th Cir., decided Aug. 1, 1972), *cert. granted*, 41 U.S.L. Week 3441 (No. 72-617, Feb. 20, 1973). See also *Keefe, supra*, 402 U.S. 418, 419.

14. As applied by the courts below in this case, the Virginia statute plainly violates the Constitution.¹⁸

So far as we are aware, a damage award for calling a "scab" a "scab" or printing a pejorative explanation of that term in a union newspaper is unprecedented. If allowed to stand, the decision below could mute not only union journals, but numerous other special audience publications around the country which try to stimulate sympathetic readers to political and social action, *inter alia*, by identifying their opponents (however correctly), and freely hurling derogatory epithets at them. The fair housing movement will have to give up "blockbuster," despite the protection afforded by this Court's decision in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); right-wing groups will have to give up "pinko"; leftist groups "Fascist"; pacifist groups "warmonger"; civil rights groups "racist." The list is endless.

The impact on the labor movement will be especially far-reaching. For the use of "insulting words," reflecting the aversion ("malice", the court below called it) of union members toward nonmembers is a commonplace, as this Court well knows. *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966); *Cafeteria Workers Union v. Angelos*, 320 U.S. 293, 295 (1943). Furthermore, union publications are addressed to workers, not genteel young ladies or aged spinsters. Working people are accustomed to tough talk, hyperbole and insult. By and large, they are not attuned to delicate innuendos. The labor press will be vastly and ad-

¹⁸ The constitutionality of the statute, as applied to the facts herein, is not saved by the common law "malice" imputed to appellants. Compare App. A, *infra*, pp. 5a, 10a with *Greenbelt supra*, 398 U.S. at 10.

versely affected if, in communicating with member-readers, it cannot use language which adversaries find offensive and which state courts and hostile juries find "insulting."

3. HOLDING THE DEFAMATION ACTIONABLE UNDER THE VIRGINIA STATUTE OVERSTEPPED THE LIMITS IMPOSED BY FEDERAL LABOR LAW

The courts below erred in holding that the statute could authorize damage awards for defamatory words published with "malice" (i.e., hostility) in the course of a labor dispute (App. A, *infra*, pp. 6a-7a). Even if the First Amendment did not preclude that holding, this Court's decision in *Linn*¹⁹ does. In *Linn*, this Court adopted the *New York Times* tests by analogy and, as a matter of federal labor policy, barred all state court defamation suits and judgments for damages arising out of labor disputes which did not meet those tests. 353 U.S. at 65. The court below properly recognized that *Linn* was applicable here (App. A, *infra*, pp. 6a-7a, 11a).²⁰ But it misinterpreted *Linn*'s references to "defamatory statements . . . made with malice" (*Id.* at 6a, quoting 353 U.S. at 55) and ignored its adoption of the *New York Times* definition of malice and the "clear and convincing evidence" standard as limitations upon defamation actions in labor disputes

¹⁹ *Linn v. Plant Guard Workers*, 383 U.S. 53, 64-66 (1966).

²⁰ Although *Linn* arose under the National Labor Relations Act, rather than under the Executive Order (see n. 13, p. 16, *supra*), that Order is essentially equivalent to the Act in both content and purpose, and "is to be accorded the force and effect given to a statute enacted by Congress." See *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967). See also *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964); *Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969).

(*id.* at 7a. Compare 383 U.S. at 65). Accordingly, the court below sustained jury instructions (p. 7, *supra*), and judgments based thereon, which indisputably conflict with the *New York Times* standards adopted in *Linn* (App. A, 10a-11a, pp. 7-8, *supra*). This error is so clear that summary reversal on this ground alone is warranted. Cf. *Henry v. Collins*, 380 U.S. 356 (1965); *Beckley Newspapers v. Hanks*, 389 U.S. 81 (1967).

4. THE DAMAGE AWARD WAS EXCESSIVE

On the assumption that the *New York Times* standards would be scrupulously observed, this Court found it necessary in *Linn* to guard against "the propensity of juries to award excessive damages for defamation [which] may pose a threat to the stability of labor unions and small employers." *Linn, supra*, 383 U.S. at 64. Accordingly, it held that trial courts should reduce or vacate excessive damage awards, *Id.* 65-66. Assuming, *arguendo*, that a state may lawfully award damage for a publication protected under *New York Times* standards, as it did here, the size of any "compensatory" award must be scrutinized even more carefully and punitive damages should be prohibited altogether.

Here, the damages were plainly excessive on their face. Cf. *New York Times v. Sullivan, supra*, 376 U.S. at 276-278. One of the appellees received \$10,000 "compensation" for being treated "coolly" by some of his co-workers and for arguing with his wife (see pp. 6-7, *supra*); none suffered any pecuniary loss.²¹ The total jury award, \$165,000, was almost seven times the total revenue of appellant Branch and over twenty-three times the annual dues paid by Branch members to ap-

²¹ The absence of pecuniary loss was one of the factors which troubled the Court in *New York Times, supra*, 376 U.S. at 277.

pellant NALC.²² Furthermore, the award was only a portion of the liability that would have been incurred had all fifteen "scabs" sued.²³ The amount of the damages plainly reflect "community hostility to [the] defendant[s] or to an ideology . . . [they] represent, rather than a dispassionate appraisal of besmirched reputation."²⁴

CONCLUSION

For the reasons set forth above, the decision below conflicts with controlling decisions of this Court (especially *Gooding*, *Linn*, *New York Times*, and *Rosenbloom*) and should be summarily reversed on the authority of those cases. As we have seen, moreover, the questions presented are important, since their resolution will have a substantial impact on the freedom of the labor press, on the free speech rights of unions and their members, and on the relationship between the

²² The Branch's total revenues in the year 1971 were \$22,952.00. 1971 Annual Report of Old Dominion Branch No. 496, National Association of Letter Carriers, Form LM-3, on file with the United States Department of Labor. Evidence presented at trial apprized the courts below of the approximate revenue of the Branch. See Def. Ex. 4, Art. VIII, § 2; Tr. 79. NALC's annual per capita dues for active (i.e., non-retired) members in 1971 were \$16. Constitution of the National Association of Letter Carriers (1970), Art. VII, § 2, Def's. Ex. 3. Since there are 400 to 420 active members in Branch 496 (Tr. 79) the total revenue received from them by NALC is between \$6,400 and \$6,720 per annum.

²³ See note 7, *supra*. There was no attempt to separate the "injury" resulting from the dissemination of the fact that appellees refused to join the union and the "injury" resulting from the publication of the "insulting" label "scab" and the offending definition.

²⁴ *Currier, Defamation In Labor Disputes: Preemption and The New Federal Common Law*, 53 VA. L. REV. 1 (1967).

federal government and the states in the delicate area of labor relations. In addition, as this case demonstrates, further explication is needed of the limits on damage awards announced in *Linn*. Accordingly, if the Court is not disposed to reverse summarily, we urge that probable jurisdiction be noted and that the questions presented be set down for full briefing and argument.²⁵

Respectfully submitted,

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²⁵ If the Court believes that one or more of the questions presented is not appealable under 28 U.S.C. § 1257(2), we respectfully request that the Court consider those issues along with the merits of the appealable issues, *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922) or that the Court treat relevant portions of this Statement as seeking *certiorari* and review those issues pursuant to 28 U.S.C. § 2103. *Cantwell v. Connecticut*, 309 U.S. 626, 310 U.S. 296 (1940).

APPENDIX

APPENDIX A

Opinion by Justice Lawrence W. I'Anson

Richmond, Virginia, November 27, 1972

Records Nos. 7917, 7918, 7919

Present: I'Anson, Carrico, Harrison, Cochran, Harman
and Poff, JJ.

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO and THE NATIONAL ASSO-
CIATION OF LETTER CARRIERS, AFL-CIO

v.

HENRY M. AUSTIN, L. D. BROWN and ROY P. ZIEGENGEIST

FROM THE LAW AND EQUITY COURT OF THE CITY
OF RICHMOND

A. Christian Compton, Judge

Defendants, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and The National Association of Letter Carriers, AFL-CIO, are here on writs of error to three judgments entered against them on jury verdicts rendered in separate actions brought by the plaintiffs, Henry M. Austin, L. D. Brown, and Roy P. Ziegengeist, under Virginia's insulting words statute, Code § 8-630. The three cases were tried together and the jury awarded each plaintiff compensatory damages of \$10,000 and punitive damages of \$45,000.

Defendants contend (1) that Code § 8-630 is unconstitutional on its face; (2) that the doctrine of federal preemption precludes the State court from exercising jurisdiction in these cases; (3) that the publication complained of was constitutionally protected free speech under the First and Fourteenth Amendments to the Constitution of the United States; (4) that instruction No. 4 was erroneous; and (5) that the damages awarded were excessive.

The evidence shows the following: Defendants were duly recognized as the exclusive collective bargaining representatives for all letter carriers in the Richmond, Virginia, area. Dues were deducted by the post office accounting office from the union members' pay checks and forwarded to the national labor union's office, and the latter office sent the local "Branch" its share of the amount collected.

Plaintiffs Austin, Brown and Ziegenggeist were employed as letter carriers by the United States Postal Service in Richmond, but they were not members of the union.

In several issues of "Carrier's Corner," a monthly newsletter published by the local Branch under the emblem of the National Association of Letter Carriers, the names of the letter carriers who had not joined the union were shown under the heading "List of Scabs." Plaintiff Austin complained to the president of the Branch and was told that this was the method used to force non-union members to join the union.

The June 1970 issue of "Carrier's Corner" carried the "List of Scabs," which consisted of fifteen names, including those of the three plaintiffs. Immediately above this list the following appeared:

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following:

'After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

'A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

'When a scab comes down the street, men turn their backs and angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

'No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

'Esau was a traitor to himself, Judas was a traitor to his God, Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class! ' ''

Copies of the June newsletter were distributed to members of the local union, and at least one copy was posted on the "station" bulletin board.

Plaintiff Austin testified that after the June article appeared some of his co-workers stopped speaking to him and otherwise manifested hostility toward him; that on two occasions at social gatherings he was referred to as the scab they were talking about; and that several months after the June publication he began having migraine headaches which were diagnosed by a physician to be the result of tension and nervousness. Brown testified that the article made him upset and nervous; that he had headaches; that he had to work in a hostile atmosphere; and that his co-workers made jokes at his expense and called him names. Ziegengeist testified that he had enjoyed a good relationship with his co-workers, but after the article appeared they became cool toward him; that his wife was distraught; and that he was harassed by union representatives. His

teen-aged daughter testified that the article had upset her mother and father, and they were all afraid that someone might come around the house and harm them.

Angelo Barker testified that he was "Secretary of the Association and editor of the paper." He said that the statement in the text complained of, that plaintiffs were traitors to their country, was made as a figure of speech, not based on fact, and that he could not say whether or not they were traitors. When cross-examined about other statements in the text he said that "Since the plaintiffs were getting the benefits of the union without joining, I think they have rotten principles." The plaintiffs "are in a sense being * * * leech[es] on these people they are associating with every day [and] I think it should be brought to light to the individuals they are associating with, what is going on."

Defendants contend that Code § 8-630 is unconstitutional on its face because it is vague and overbroad and infringes upon the right of free speech that is protected by the First and Fourteenth Amendments.

Code § 8-630 reads as follows:

"All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."

Defendants rely on the recent United States Supreme Court case of *Gooding v. Wilson*, 405 U.S. 518, 520-21, 526-28, 92 S.Ct. 1103, 1105, 1108-09, 31 L.Ed.2d 408, 413, 416-17 (1972). The Court held that the Georgia statute, providing that "Any person who shall, without provocation, use to or of another, and in his presence * * * opprobrious words or abusive language, tending to cause a breach of the peace * * * shall be guilty of a misdemeanor," was on its face unconstitutional, vague and overbroad under the First and Fourteenth Amendments because it had "not

been narrowed by Georgia appellate courts to apply only to 'fighting' words which by their very utterance * * * tend to incite an immediate breach of peace," citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942).

In Virginia we have held that a civil action brought under Code § 8-630, the insulting words statute, is one for libel or slander and the common-law rules of slander are to be applied, even though the language used is defamatory on its face. *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 528, 29 S.E.2d 375, 382-83 (1944); *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 6, 82 S.E.2d 588, 591 (1954); *Shupe v. Rose's Stores, Inc.*, 213 Va. —, — S.E.2d —, this day decided.

We have also held that a libelous statement, otherwise actionable, may not be so for the reason that the circumstances under which it was published confer upon the publisher a privilege to publish it. The basis for such privilege is the public interest in free expression and communication of ideas. Where this interest is sufficient to outweigh the interest of the State in protecting the individual plaintiff from damage to his reputation and social relationships, the law does not allow recovery of damages, compensatory or punitive, occasioned by defamatory speech or publication, unless there has been an abuse of the privilege by a showing that the defamatory language, either written or spoken, was made with actual malice. See *Story v. Newspapers*, 202 Va. 588, 591, 118 S.E.2d 668, 670 (1961); *Sanders v. Harris, et al.*, 213 Va. —, — S.E.2d —, this day decided.

Under our construction and limitations of Code § 8-630, only those words which are not protected by the First Amendment are actionable under the statute. Thus the objections of vagueness and overbreadth that were raised in *Gooding* are not applicable in this case.

Defendants contend that the doctrine of federal preemption precludes the State from imposing liability in these cases, since defendants' conduct falls within the area subject to exclusive federal regulation under Executive Order 11491.¹

The effect of Executive Order 11491, which is essentially equivalent in both content and purpose to the National Labor Relations Act, upon the jurisdiction of state courts to apply state law to an action against a labor union for the publication of libelous statements during a union organizational campaign was determined by the Supreme Court of the United States in *Linn v. United Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 583 (1966).

A majority of the Court, through Mr. Justice Clark, in *Linn*, said:

"We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55, 86 S.Ct. at 659, 15 L.Ed.2d at 583.

The majority of the Court also said:

"But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all,

¹ At the time these cases arose, labor relations in the postal service were regulated by Executive Order 11491, rather than the National Labor Relations Act. Defendants conceded that the Executive Order is essentially equivalent to the Act in both content and purpose, and "is to be accorded the force and effect given the statute enacted by Congress." *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (5th Cir., 1967), *cert. den.* 389 U.S. 977 (1967). The Postal Reorganization Act, P.L. 91-375, 84 Stat. 719, 39 U.S.C. 101, *et seq.*, enacted August 12, 1970, left this Executive Order in effect until superseded by Chapter 12 thereof, which became effective on July 1, 1971. See 84 Stat. 787, § 15(a). Chapter 12 of PRA makes the National Labor Relations Act, in substance, applicable to the postal service.

the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." Id. 383 at 63, 86 S.Ct. at 663, 15 L.Ed.2d at 590.

"The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. * * * The Board [National Labor Relations Board] can award no damages, impose no penalty, or give any other relief to the defamed individual.

"On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation." Id. 383 at 63-64, 86 S.Ct. at 663, 15 L.Ed.2d at 590.

Hence we hold that Executive Order 11491 has not preempted the state court from exercising jurisdiction in these cases.

Defendants contend that the publication in these cases constituted protected free speech under the First and Fourteenth Amendments to the Constitution of the United States and the doctrine of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in the absence of evidence of "convincing clarity" that the statement was factually false and made with the knowledge of its falsity or with reckless disregard of its truth or falsity.

Beginning with *New York Times*, the United States Supreme Court has considered the extent to which state libel laws have to yield to the constitutional protection of freedom of speech and of the press. *New York Times* held that before there can be a recovery of damages in a civil libel action instituted by a "public official" against a newspaper, the constitutional guarantees of freedom of speech and of the press require evidence of convincing clarity that the defamatory falsehood alleged as libel was made "with 'actual malice'—that is with knowledge that it was false

or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706.

The impact of the First Amendment upon state libel laws was broadened to include "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), expanded the *New York Times'* knowing-or-reckless-falsity standard to a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a radio broadcast where the statement made concerned an issue of "public or general interest."

In *Rosenbloom* the Supreme Court noted that it "has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved." 403 U.S. at 48, fn. 17, 91 S.Ct. at 1822, fn. 17, 29 L.Ed.2d at 315, fn. 17.

In the case at bar the plaintiffs had the right to decide for themselves whether they would join the union, under the provisions of Executive Order 11491 and Virginia's "right to work law," Code § 40.1-58 to 40.1-69. The fact that plaintiffs elected not to join the union was only a private matter and an issue of general or public interest was not involved.

Since plaintiffs were neither "public officials" nor "public figures" and whether or not they joined the union did not present an issue of public or general concern, we hold that *New York Times*, *Butts*, and *Rosenbloom* are not applicable in the cases at bar.

Thus Virginia law, which is applicable in these cases, only required plaintiffs to prove by a preponderance of the evidence that a defamatory publication was made with actual malice.

For words to be considered as defamatory and actionable it is not necessary that the defamation charge be in direct terms. It may be made by inference, implication, innuendo, or insinuation. *Carwile*, 196 Va. at 7, 82 S.E.2d at 591-92; *James v. Powell*, 154 Va. 96, 152 S.E. 539 (1930).

Here the text of the publication complained of conveyed to the reader that the plaintiffs were traitors and men of such low character and rotten principles that they should be despised by their fellow workers. Hence this was not a publication protected by the First Amendment.

Instruction No. 4, complained of, reads as follows:

"Under the facts and circumstances of these cases, the statements in question were made upon an occasion known in the law as privileged, and the defendants are not liable for making such statements unless the defendants have abused such privilege.

"Under these circumstances, the burden is upon each plaintiff to prove by a preponderance of the evidence that the defendant Old Dominion Branch 496, National Association of Letter Carriers AFL-CIO, which was acting as the agent of the defendant The National Association of Letter Carriers AFL-CIO, circulated defamatory statements in June of 1970 with actual malice and that such defamatory statements, if any, caused him damage. You may not award damages for statements made at other times or other occasions.

"The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

"In determining whether or not the language complained of is insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual con-

struction and common acceptance under the circumstances of this case, that is, in a labor dispute.

"The term 'actual malice' is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff.

"In this connection you are told, however, that mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A certain amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law.

"If you believe that each plaintiff has proven the above elements by a preponderance of the evidence, you shall find your verdict for the plaintiffs, or plaintiff as the case may be, against both defendants, and assess the damages in accordance with the instruction on damages.

"If the plaintiffs, or any one or more of the plaintiffs as the case may be, has failed to prove his case by a preponderance of the evidence, you shall find in favor of the defendants in such case or cases."

The record shows that defendants objected and saved their exceptions to the instruction only on the following grounds: that the preponderance of evidence standard of proof is not applicable here, because under federal law the burden was on the plaintiffs to prove by clear and convincing evidence that the publication was made with actual malice, that is, with knowledge of its falsity or with reckless disregard of whether it was true or false; and that there was no evidence upon which the court could instruct the jury that the local Branch was acting as the agent of the National Association.

Having held that the federal rules as to burden of proof and knowing-or-reckless-falsity standard enunciated in *New*

York Times are not applicable in these cases, we reject defendants' contention that federal law, not Virginia law, should be applied in these cases.

Defendants' objection that the court erred in instructing the jury that the Branch was an agent of the National Association cannot be sustained. The evidence shows that an agency relationship existed between the Branch and the National Association. The publication was under the National Association's insignia, and it was published for the purpose of forcing plaintiffs to join the Branch and the National Association. See *United Constr. Wks. v. Laburnum*, 194 Va. 872, 879-86, 75 S.E.2d 694, 700-704 (1953), *aff'd* 347 U.S. 656 (1954).

Lastly, defendants contend that the damages are excessive.

In *Linn, supra*, 383 U.S. at 65-66, 86 S.Ct. at 664-65, 15 L.Ed.2d at 591, the Court set out the items of damages that may be considered by a jury. There it was said:

"We, therefore, hold that a complainant may not recover except upon proof of such harm which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. * * * Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages."

There is no fixed standard for measuring exemplary or punitive damages, and the amount of the award is largely a matter of discretion with the jury. *United Constr. Wks. v. Laburnum, supra*, 194 Va. at 895, 75 S.E.2d at 709.

We cannot say from the evidence presented that the amounts of the compensatory and punitive damages awarded plaintiffs were excessive.

For the reasons stated, the judgments are

Affirmed.

APPENDIX B**Executive Order 11491**

WHEREAS the public interest requires high standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employee and efficient administration of the Government are benefited by providing employee an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

Now, **THEREFORE**, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the Executive Branch of the Government in all dealings with Federal employees and organizations representing such employees.

GENERAL PROVISIONS

Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist

a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the Executive Branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

(b) Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

Sec. 2 Definitions. When used in this Order, the term—

(a) “Agency” means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office;

(b) “Employee” means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of formal or exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this order;

(c) “Supervisor” means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay

off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(d) "Guard" means an employee assigned to enforce against employees and other persons rules to protect agency property or the safety of persons or agency premises, or to maintain law and order in areas or facilities under Government control;

(e) "Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which—

(1) consists of management officials or supervisors, except as provided in section 24 of this Order;

(2) asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in such a strike, or imposes a duty or obligation to conduct, assist or participate in such a strike;

(3) advocates the overthrow of the constitutional form of government in the United States; or

(4) discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age or national origin;

(f) "Agency management" means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency

on any matters relating to the implementation of the agency labor-management relations program established under this Order;

(g) "Council" means the Federal Labor Relations Council established by this Order;

(h) "Panel" means the Federal Service Impasses Panel established by this Order; and

(i) "Assistant Secretary" means the Assistant Secretary of Labor for Labor-Management Relations.

Sec. 3. Application. (a) This Order applies to all employees and agencies in the executive branch, except as provided in paragraphs (b), (c) and (d) of this section.

(b) This Order (except section 22) does not apply to—

(1) the Federal Bureau of Investigation;

(2) the Central Intelligence Agency;

(3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations; or

(4) any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency.

(c) The head of an agency may, in his sole judgment, suspend any provision of this Order (except section 22) with respect to any agency installation or activity located out-

side the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

(d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

ADMINISTRATION

Sec. 4. Federal Labor Relations Council. (a) There is hereby established the Federal Labor Relations Council, which consists of the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the executive branch as the President may designate from time to time. The Civil Service Commission shall provide services and staff assistance to the Council to the extent authorized by law.

(b) The Council shall administer and interpret this Order, decide major policy issues, prescribe regulations, and from time to time, report and make recommendations to the President.

(c) The Council may consider, subject to its regulations—

(1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order;

(2) appeals on negotiability issues as provided in section 11(c) of this Order;

(3) exceptions to arbitration awards; and

(4) other matters it deems appropriate to assure the effectuation of the purposes of this Order.

Sec. 5 Federal Service Impasses Panel. (a) There is hereby established the Federal Service Impasses Panel as an agency within the Council. The Panel consists of at least three members appointed by the President, one of whom he designates as chairman. The Council shall provide the services and staff assistance needed by the Panel.

(b) The Panel may consider negotiation impasses as provided in section 17 of this Order and may take any action it considers necessary to settle an impasse.

(c) The Panel shall prescribe regulations needed to administer its function under this Order.

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations. (a) The Assistant Secretary shall—

(1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration;

(2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results;

(3) decide questions as to the eligibility of labor organizations for national consultation rights under criteria prescribed by the Council; and

(4) except as provided in section 19(d) of this Order, decide complaints of alleged unfair labor practices and alleged violations of the standards of conduct for labor organizations.

(b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as

he considers appropriate to effectuate the policies of this Order.

(c) In performing the duties imposed on him by this section, the Assistant Secretary may request and use the services and assistance of employees of other agencies in accordance with section 1 of the Act of March 4, 1915, (38 Stat. 1084, as amended; 31 U.S.C. § 686).

(d) The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order.

(e) If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

RECOGNITION

Sec. 7. Recognition in general. (a) An agency shall accord exclusive recognition or national consultation rights at the requests of a labor organization which meet the requirements for the recognition or consultation rights under this Order.

(b) A labor organization seeking recognition shall submit to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.

(c) When recognition of a labor organization has been accorded, the recognition continues as long as the organization continues to meet the requirements of this Order applicable to that recognition, except that this section does not require an election to determine whether an organization should become, or continue to be recognized as, exclusive representative of the employees in any unit or subdivision

thereof within 12 months after a prior valid election with respect to such unit.

(d) Recognition, in whatever form accorded, does not—

(1) preclude an employee, regardless of whether he is a member of a labor organization, from bringing matters of personal concern to the attention of appropriate officials under applicable law, rule, regulations, or established agency policy; or from choosing his own representative in a grievance or appellate action;

(2) preclude or restrict consultants and dealings between an agency and a veterans organization with respect to matters of particular interest to employees with veterans preference; or

(3) preclude an agency from consulting or dealing with a religious, social, fraternal, or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members.

Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.

(e) An agency shall establish a system for intra-management communication and consultation with its supervisors or associations of supervisors. The communications and consultations shall have as their purposes, the improvement of agency operations, the improvement of working conditions of supervisors, the exchange of information, the improvement of managerial effectiveness, and the establish-

ment of policies that best serve the public interest in accomplishing the mission of the agency.

(f) Informal recognition shall not be accorded after the date of this Order.

Sec. 8. Formal Recognition. (a) Formal recognition, including formal recognition at the national level, shall not be accorded after the date of this Order.

(b) An agency shall continue any formal recognition, including formal recognition at the national level, accorded a labor organization before the date of this Order until—

(1) the labor organization ceases to be eligible under this Order for formal recognition so accorded;

(2) a labor organization is accorded exclusive recognition as representative of employees in the unit to which the formal recognition applies; or

(3) the formal recognition is terminated under regulations prescribed by the Federal Labor Relations Council.

(c) When a labor organization holds formal recognition, it is the representative of its members in a unit as defined by the agency when recognition was accorded. The agency, through appropriate officials, shall consult with representatives of the organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that affect members of the organization in the unit to which the formal recognition applies. The organization is entitled from time to time to raise such matters for discussion with appropriate officials and at all times to present its views thereon in writing. The agency is not required to consult with the labor organization on any matter on which it would not be required to meet and confer if the labor organization were entitled to exclusive recognition.

Sec. 9. National consultation rights. (a) An agency shall accord national consultation rights to a labor organization

which qualifies under criteria established by the Federal Labor Relations Council as the representative of a substantial number of employees of the agency. National consultation rights shall not be accorded for any unit where a labor organization already holds exclusive recognition at the national level for that unit. The granting of national consultation rights does not preclude an agency from appropriate dealings at the national level with other organizations on matters affecting their members. An agency shall terminate national consultation rights when the labor organization ceases to qualify under the established criteria.

(b) When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may confer in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

(c) Questions as to the eligibility of labor organizations for national consultation rights may be referred to the Assistant Secretary for decision.

Sec. 10. Exclusive recognition. (a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected in a secret ballot election, by a majority of the employees in an appropriate unit as their representative.

(b) A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear

and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be established if it includes—

(1) any management official or supervisor, except as provided in section 24;

(2) an employee engaged in Federal personnel work in other than a purely clerical capacity;

(3) any guard together with other employees; or

(4) both professional and nonprofessional employees unless a majority of the professional employees vote for inclusion in the unit.

Questions as to the appropriate unit and related issues may be referred to the Assistant Secretary for decision.

(c) An agency shall not accord exclusive recognition to a labor organization as the representative of employees in a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(d) All elections shall be conducted under the supervision of the Assistant Secretary, or persons designated by him, and shall be by secret ballot. Each employee eligible to vote shall be provided the opportunity to choose the labor organization he wishes to represent him, from among those on the ballot, or "no union." Elections may be held to determine whether—

(1) a labor organization should be recognized as the exclusive representative of employees in a unit;

(2) a labor organization should replace another labor organization as the exclusive representative; or

(3) a labor organization should cease to be the exclusive representative.

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

AGREEMENTS

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and

confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) A labor organization may appeal to the Council for a decision when—

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order.

Sec. 12. Basic of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level:

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency; and

(c) nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.

The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supple-

mental, implementing, subsidiary, or informal agreements between the agency and the organization.

Sec. 13. Grievance procedures. An agreement with a labor organization which is the exclusive representative of employees in an appropriate unit may provide procedures, applicable only to employees in the unit, for the consideration of employee grievances and of disputes over the interpretation and application of agreements. The procedure for consideration of employee grievances shall meet the requirements for negotiated grievance procedures established by the Civil Service Commission. A negotiated employee grievance procedure which conforms to this section, to applicable laws, and to regulations of the Civil Service Commission and the agency in the exclusive procedure available to employees in the unit when the agreement so provides.

Sec. 14 Arbitration of grievances. (a) Negotiated procedures may provide for the arbitration of employee grievances and of disputes over the interpretation of application of existing agreements. Negotiated procedures may not extend arbitration to changes or proposed changes in agreements or agency policy. Such procedures shall provide for the invoking of arbitration only with the approval of the labor organization that has exclusive recognition and, in the case of an employee grievance, only with the approval of the employee. The costs of the arbitrator shall be shared equally by the parties.

(b) Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council.

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing pub-

lished agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

NEGOTIATION DISPUTES AND IMPASSES

Sec. 16. Negotiation disputes. The Federal Mediation and Conciliation Service shall provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes. The Service shall determine under what circumstances and in what manner it shall proffer its services.

Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

CONDUCT OF LABOR ORGANIZATION AND MANAGEMENT

Sec. 18. Standards of conduct for labor organizations.

(a) An agency shall accord recognition only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in paragraph (b) of this section, an organization is not required to prove that it has the required freedom when it is subject to governing requirements adopted by the

organization or by a national or international labor organization or federation of labor organizations with which it is affiliated or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices, including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participation in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary procedures;

(2) the exclusion from office in the organization of persons affiliated with Communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in paragraph (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences opposed to basic democratic principles when there is reasonable cause to believe that—

(1) the organization has been suspended or expelled from or is subject to other sanction by a parent labor organization or federation of organizations with which it had been affiliated because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by paragraph (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this Order.

(c) A labor organization which has or seeks recognition as a representative of employees under this Order shall file financial and other reports, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe the regulations needed to effectuate this section. These regulations shall conform generally to the principles applied to unions in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary.

Sec. 19. Unfair labor practices. (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order;

(5) refuse to accord appropriate recognition to a labor organization qualified to such recognition; or

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

(b) A labor organization shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;

(2) attempt to induce agency management to coerce an employee in the exercise of his rights under this Order;

(3) coerce, attempt to coerce, or discipline, fine, or take other economic sanction against a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an officer or employee of the United States;

(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;

(5) discriminate against an employee with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin; or

(6) refuse to consult, confer, or negotiate with an agency as required by this Order.

(c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

(d) When the issue in a complaint of an alleged violation of paragraph (a)(1), (2) or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.

MISCELLANEOUS PROVISIONS

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization,

shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management.

Sec. 21. Allotment of dues. (a) When a labor organization holds formal or exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when—

(1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or

(2) the employee has been suspended or expelled from the labor organization.

(b) An agency may deduct the regular and periodic dues of an association of management officials or supervisors from the pay of members of the association who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions, when the agency and the association agree in writing to this course of action. Such an allotment is subject to the regulations of the Civil Service Commission.

Sec. 22. Adverse action appeals. The head of each agency, in accordance with the provisions of this Order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligible under sections 7511-7512 of title 5 of the United States Code. Each employee in the competitive service shall have the right to appeal in the Civil Service Commission from an adverse decision of the administrative

officer so acting, such appeal to be processed in an identical manner to that provided for appeals under section 7701 of title 5 of the United States Code. Any recommendation by the Civil Service Commission submitted to the head of an agency on the basis of an appeal by an employee in the competitive service shall be complied with by the head of the agency.

Sec. 23. Agency implementation. No later than April 1, 1970, each agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes but is not limited to a clear statement of the rights of its employees under this Order; procedures with respect to recognition of labor organizations, determination of appropriate units, consultation with labor organizations, approval of agreements, mediation, and impasse resolution; policies with respect to the use of agency facilities by labor organizations; and policies and practices regarding consultation with other organizations and associations and individual employees. Insofar as practicable, agencies shall consult with representatives of labor organizations in the formulation of these policies and regulations, other than those for the implementation of section 7(e) of this Order.

Sec. 24. Savings clauses. (a) This Order does not preclude—

(1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962); or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent the management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the date of this Order.

(b) All grants of informal recognition under Executive Order No. 10988 terminate on July 1, 1970.

(c) All grants of formal recognition under Executive Order No. 10988 terminate under regulations which the Federal Labor Relations Council shall issue before October 1, 1970.

(d) By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition and from coverage by negotiated agreements, except as provided in paragraph (a) of this section.

Sec. 25. Guidance, training, review and information.

(a) The Civil Service Commission shall establish and maintain a program for the guidance of agencies on labor-management relations in the Federal service; provide technical advice and information to agencies; assist in the development of programs for training agency personnel and management officials in labor-management relations; continuously review the operation of the Federal labor-management relations program to assist in assuring adherence to its provisions and merit system requirements; and, from time to time, report to the Council on the state of the program with any recommendations for its improvement.

(b) The Department of Labor and the Civil Service Commission shall develop programs for the collection and dissemination of information appropriate to the needs of agencies, organizations and the public.

Sec. 26. Effective date. This Order is effective on January 1, 1970 except sections 7(f) and 8 which are effective immediately. Effective January 1, 1970, Executive Order No. 10988 and the President's Memorandum of May 21, 1963, entitled Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, are revoked.

RICHARD NIXON

APPENDIX C

IN THE SUPREME COURT OF VIRGINIA

Record No.7917

OLD DOMINION BRANCH No. 496, National Association of
Letter Carriers, AFL-CIO, and National Association of
Letter Carriers, AFL-CIO,

Plaintiffs in Error,

v.

HENRY M. AUSTIN, *Defendant in Error.*

Notice of Appeal

PLEASE TAKE NOTICE that plaintiffs in error, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby appeal to the Supreme Court of the United States from the judgment of the Court entered against them in this action on November 27, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1257.

Respectfully submitted,

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Israel Steingold
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*Attorneys for Plaintiff in
Error.*

Filed
Dec 20, 1972

IN THE SUPREME COURT OF VIRGINIA

Record No. 7118

OLD DOMINION BRANCH No. 496, National Association of
Letter Carriers, AFL-CIO, and National Association of
Letter Carriers, AFL-CIO,
Plaintiffs in Error,

v.

L. D. BROWN, *Defendant in Error.*

Notice of Appeal

PLEASE TAKE NOTICE that plaintiffs in error, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby appeal to the Supreme Court of the United States from the judgment of the Court entered against them in this action on November 27, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1257.

Respectfully submitted,

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*Attorneys for Plaintiff in
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Filed

Dec 20, 1972

IN THE SUPREME COURT OF VIRGINIA

Record No. 7119

OLD DOMINION BRANCH No. 496, National Association of
Letter Carriers, AFL-CIO, and National Association of
Letter Carriers, AFL-CIO,

Plaintiffs in Error,

v.

ROY P. ZIEGENGEIST, *Defendant in Error.*

Notice of Appeal

PLEASE TAKE NOTICE that plaintiffs in error, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, hereby appeal to the Supreme Court of the United States from the judgment of the Court entered against them in this action on November 27, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1257.

Respectfully submitted,

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Filed
Dec 20, 1972

Certificate of Service

I hereby certify that copies of the foregoing Notice of Appeal, have been served this 18th day of December, 1972, by first-class mail, postage prepaid, upon:

Parker E. Cherry, Esq., 1012 Mutual Building, Richmond, Virginia 23219.

Stephen M. Kapral, Esq., 4510 S. Laburnum Avenue, Richmond, Virginia 23231. All parties required to be served have been served in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

MOZART G. RATNER



Supreme Court of the United States

October Term, 1972

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Appellants,

v.

HENRY M. AUSTIN, L. D. BROWN, AND
ROY P. ZIEGENGEIST,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT
OF VIRGINIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the jurisdictional statement, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 115 national and international unions having a total membership of approximately 13,500,000 working men and women.

Organizing the unorganized is the lifeblood of the trade union movement. And, as this Court has recognized:

“representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.” *Linn v. Plant Guard Workers*, 383 U.S. 53, 58

The instant case involves a defamation judgment of \$165,000¹ in favor of three individuals, who proved no pecuniary losses and little, if any, intangible harm, assessed because a local union, during an organizing effort, accurately characterized those individuals as “scabs” in the local’s newsletter, and embellished that characterization with an uncomplimentary description of “what a scab is,” attributed to Jack London. J.S. 1a-4a. Since organizing campaigns “are ordinarily heated affairs” and the use of “epithets such as ‘scab’ . . . are commonplace in these struggles” (*Linn*, 383 U.S. at 58, 61-62), this enormous, and so far as we are aware unprecedented, judgment obviously undermines the “principle that debate . . . should be uninhibited, robust, and wide open,” which this Court has stated “weigh[s] heavily” in the present context (*id.* at 62-63). It is for this reason that the AFL-CIO wishes to present its views to the Court.

¹ A sum equal to approximately seven times the total annual revenue of the local union which published the alleged defamation and over twenty-three times the annual dues paid by the local’s members to the national union also sued. J.S. 21-22.

Since this is an appeal, the Unions have placed their main emphasis on the substantial First Amendment issues presented. J.S. 9-20. We agree with the points they make. But there is a narrower basis for reversal which is raised but not fully elaborated in the jurisdictional statement (at pp. 3, 20-21)—the Virginia courts' plain error in refusing to apply the federal substantive labor law of defamation enunciated in *Linn*. Both because of its intrinsic importance, and because decision on that non-constitutional ground obviates the necessity of reaching the First Amendment issues, our argument is focused upon development of the point that this Court's holding in *Linn* requires summary reversal here.

ARGUMENT

THE DEFAMATION JUDGMENT AGAINST THE DEFENDANT UNIONS SHOULD BE SUMMARILY REVERSED SINCE THE STATEMENTS UPON WHICH IT IS BASED ARE NOT ACTIONABLE UNDER THE GOVERNING FEDERAL STANDARD ENUNCIATED IN *LINN V. PLANT GUARD WORKERS*, 383 U.S. 53

(a) In support of an effort to organize non-members of the bargaining unit of which it was the majority representative, Old Dominion Branch No. 496 of the National Association of Letter Carriers, AFL-CIO, published the non-members' names under the heading "List of Scabs" in the Branch's monthly newsletter. And in the June, 1970, issue, the newsletter also carried the colorful rhetoric, attributed to Jack London, describing a scab, *inter alia*, as a "two-legged animal with a corkscrew soul, a water brain, a com-

bination backbone of jelly and glue''. The newsletter was sent to the Branch's members and posted on a bulletin board at a post office station (there is no evidence that anyone other than a letter carrier saw it there). J.S. 1a-3a. Three of the non-members whose names were listed sued the Unions in the state courts under Virginia's insulting words statute, Virginia Code § 8-630. After proceedings in which the Unions preserved their federal defenses, including those based on federal labor law, and in which the plaintiffs proved no pecuniary losses and made only the most minimal showing of less tangible injury (such as mental suffering), the Supreme Court of Virginia affirmed a judgment of \$10,000 compensatory damages and \$45,000 punitive damages for each plaintiff. J.S. 1a, 3a-4a, 6a-8a, 11a.

(b) In *Linn v. Plant Guard Workers*, 383 U.S. 53, this Court announced three propositions of the federal law governing state actions for defamation growing out of a union campaign to organize workers as to which the protections of § 7 of the National Labor Relations Act apply.² First, that the exclusive primary jurisdiction principle of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, does not oust the state courts' jurisdiction to entertain such

² In the instant case the source of the federal right to organize was not § 7 of the NLRA, but a parallel provision—§ 1 of Executive Order 11491 (J.S. 12a-13a). The court below recognized that the Executive Order "is essentially equivalent in both content and purpose to the National Labor Relations Act, . . . and 'is to be accorded the force and effect given the statute enacted by Congress.' *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (C.A.5), cert. den. 389 U.S. 977." J.S. 6a & n. 1.

suits. *Linn*, 383 U.S. at 59-61. Second, that, since federal law establishes that "epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in [organizational] struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute" (*id.* at 60-61), the substantive law the states may apply in exercising that jurisdiction is "limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false" (*id.* at 61).³ Third, the Court prescribed certain rules for measuring damages where the plaintiff has met this standard for proving liability. *Id.* at 65-66 (see also n. 4 p. 6 *infra*).

The court below acknowledged the controlling authority of *Linn* for the instant case insofar as that decision is protective of state jurisdiction. Its holding that federal law "has not preempted the state court from exercising jurisdiction in these cases" is squarely based on *Linn*. J.S. 6a-7a. And its determination as to whether the damages awarded were excessive is centered on a lengthy (albeit highly

³ While less frequently utilized to vindicate paramount federal labor policy than the *Garmon* rule, this Court's decisions also establish the principle (relied upon in the portion of *Linn* noted above) that where the state courts do have jurisdiction, they may not apply state substantive law to "forbid the exercise of rights explicitly protected by § 7" without contravening the Supremacy Clause. *Bus Employees v. Missouri*, 374 U.S. 74, 82; see also e.g. *Hill v. Florida*, 325 U.S. 538; *Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62; *Teamsters Union v. Oliver*, 358 U.S. 283; *Nash v. Florida Industrial Commission*, 389 U.S. 235.

selective)⁴ quotation from *Linn* which the state court read as "set[ting] out the items of damages that may be considered by a jury." J.S. 11a.

But the state courts refused to follow *Linn* insofar as that decision limited the scope of the Virginia substantive law of libel. In the face of this Court's holding that in cases such as this:

"The standards enunciated in *New York Times v. Sullivan*, 376 US 254 (1964), are adopted by analogy . . . to permit recovery of damages in a state cause of action *only* for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false [in order to] guard against abuse of [the] libel action, and [the] unwarranted intrusion upon free discussion envisioned by [federal law]" (*Linn*, 383 U.S. at 65; emphasis supplied)

the court below held:

"that *New York Times* . . . [is] not applicable in the cases at bar . . . [and] that the federal rule as to . . .

⁴ The court below began its quotation with the portion of the *Linn* opinion immediately following this Court's statement: "[E]ven in those jurisdictions . . . where certain language characteristics of labor disputes may be held actionable per se . . . the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle." 383 U.S. at 65. And within the quotations the three asterisks elided the sentences: "The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that [the] rule [requiring proof of severe harm] be followed. If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." *Id.* at 65-66.

[the] knowing-or-reckless-falsity standard enunciated in *New York Times* is not applicable in these cases". J.S. 8a, 10a-11a.

(c) The statements published in the Branch's newsletter are not actionable under the *Linn* standard. Concededly, at the time their names were listed, the individuals named were nonmembers. And a "scab" is "one who refuses to join a union." Webster's Unabridged New Twentieth Century Dictionary, Second Edition, p. 1614. Thus, this case involves the accurate use of an epithet and not "defamatory statements published with knowledge of their falsity" (*Linn*, 383 U.S. at 65). Moreover the definition of "scab" printed in the Branch's newsletter (J.S. 2a-3a) was "no more than rhetorical hyperbole"; and, thus, under the *New York Times* standards adopted in *Linn*, provides no basis for the judgment rendered. *Greenbelt Cooperative Publ. Assn. v. Bresler*, 398 U.S. 6, 14; see also *Cafeteria Workers v. Angelos*, 320 U.S. 293.⁵

(d) In *Linn* the Court voiced cautious optimism that the limited inroads there made on "state libel remedies" would be sufficient to vindicate the "national labor policy," which is protective of "vehement, caustic, and sometimes unpleasantly sharp attacks . . . provided [they] fall short of a

⁵ Since the alleged defamation here was published in a newsletter, even assuming *arguendo* that the term "scab" as defined in that publication could be considered a "fighting" word, the judgment below cannot be supported on the basis of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572; for that case only sanctions state power to redress "face to face words" which "tend to invite an immediate breach of the peace" (*id.* at 572-753). See *Gooding v. Wilson*, 405 U.S. 518, 521-523.

deliberate or reckless untruth;" but noted that it would reconsider its holding that the states' jurisdiction is not entirely preempted "if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy." 383 U.S. at 67, 62-63.

We do not urge such reconsideration now. The Court evidently intended such a step to come after the substantive rule of *Linn*—that the *New York Times* standards are applicable in defamation suits growing out of union organizing efforts covered by federal law—had been given the opportunity to operate. But this presupposes, and surely this Court anticipated, that the state courts would respect the *Linn* rule. The court below having failed to do so, summary reversal on the basis of *Linn* is necessary to vindicate the authority of this Court's precedents.

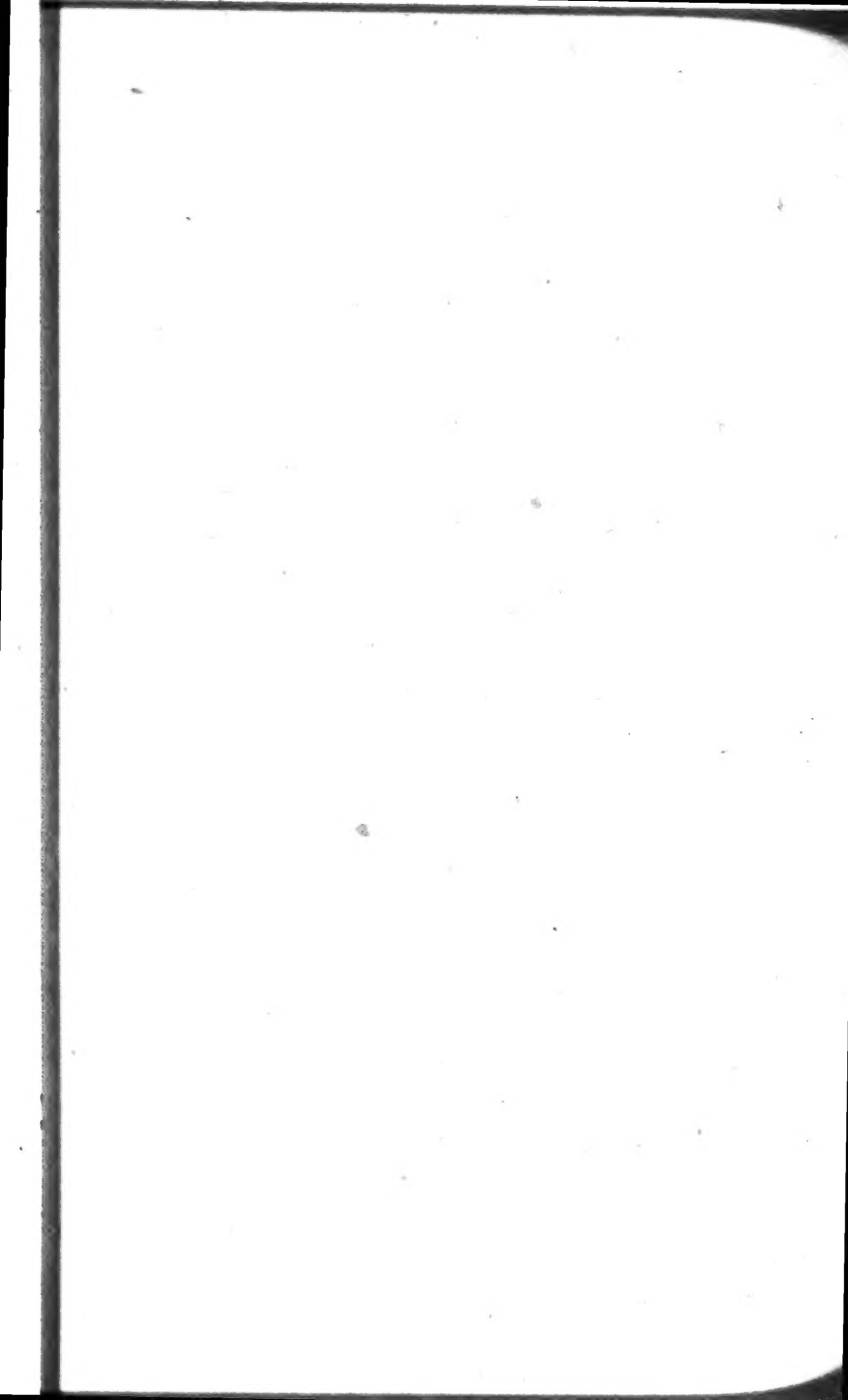
CONCLUSION

For the reasons set out above, as well as those noted in the jurisdictional statement, the decision below should be summarily reversed on the authority of *Linn v. Plant Guard Workers*, 383 U.S. 53.

Respectfully submitted,
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March, 1973



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MICHAEL RODAK, JR., CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972**

No. 72-1180

**OLD DOMINION BRANCH NO. 496,
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO**

and

**NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, Appellants,**

v.

**RESPONSE AND MOTION OF HENRY M. AUSTIN,
L.D. BROWN, AND ROY P. ZIEGENGEIST TO
DISMISS APPEAL OF OLD DOMINION BRANCH NO.
496, NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO, and NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO, FROM A JUDGMENT
OF SUPREME COURT OF VIRGINIA**

**This brief is filed on behalf of Henry M. Austin, L.D.
Brown and Roy P. Ziegenggeist, in support of motion to dismiss
the appeal, as provided in Rule 16, of the Rules of this Court.**

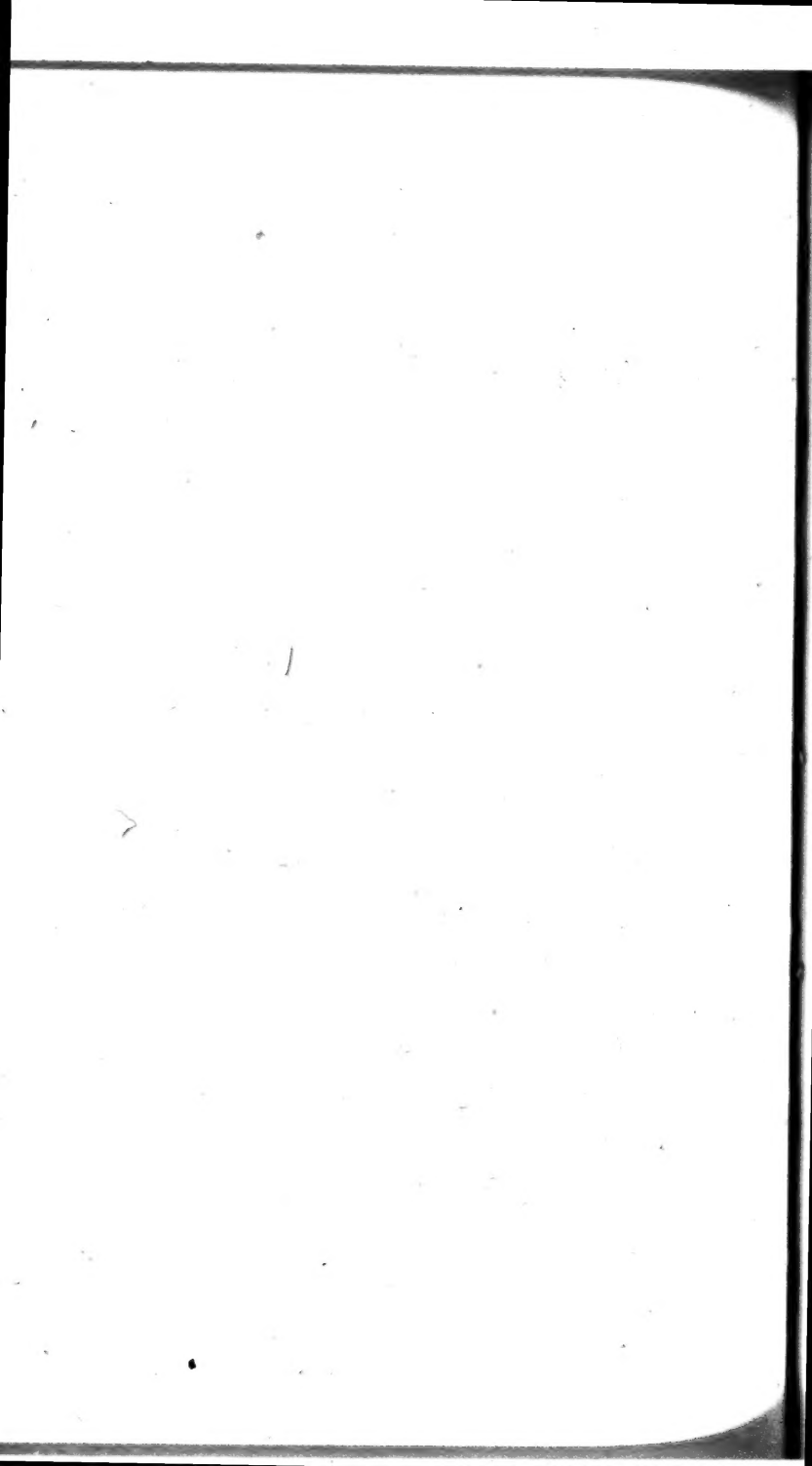


TABLE OF CONTENTS

QUESTIONS PRESENTED ON APPEAL

- 1. APPELLANTS ASSERT THE STATUTE (Virginia Code 8-630) AS AUTHORITATIVELY CONSTRUED IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.**
 - (a) Overbreadth..... 1
 - (b) Vagueness..... 2
- 2. APPELLANTS ASSERT THE STATUTE AS APPLIED IS UNCONSTITUTIONAL BECAUSE THE PUBLICATION PENALIZED THEREUNDER IS PROTECTED BY THE FIRST AMENDMENT..... 3**
- 3. APPELLANTS ASSERT HOLDING THE DEFAMATION ACTIONABLE UNDER THE VIRGINIA STATUTE OVERSTEPPED THE LIMITS IMPOSED BY FEDERAL LABOR LAW..... 5**
- 4. APPELLANTS ASSERT THE DAMAGE AWARD WAS EXCESSIVE..... 5**

RESPONSE TO BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE..... 6

CONCLUSION..... 7

CERTIFICATE OF SERVICE..... 8

AUTHORITIES CITED

<i>Cases:</i>	<i>Page</i>
Brooks v. Calloway; 12 Leigh (39 Va.).....	1
Carwile v. Richmond Newspapers Inc. 196 Va. 1, 6, 82 S.E. 2nd 588, 591 (1954).....	1
Coates v. Cincinnati; 402 U.S. 611.....	2
Cook v. Patterson Drug Co. 185 Va. 516.....	1
Gooding v. Wilson, 405 U.S. 518 (1972).....	1
Linn v. United Plant Guard Workers of Am. Local 114; 86 Sp.Ct. 667; 383 U.S. 53.....	2
M. Rosenberg & Sons v. Craft, 182 Va. 512; 528; 29 S.E. (2nd) 375, 382-83 (1944).....	1
New York Times Co. v. Sullivan; 84 Sp.Ct. 710; 376 U.S. 254; 259.....	4
Rosenblatt v. Baer; 383 U.S. 75, 87	2
Rosenbloom v. Metromedia; 403 U.S. 29	2
Roth v. U.S.; 77 Sp. Ct. 1304; 354 U.S. 476; 1 L Ed. 2nd 1498 78 Sp.Ct. 8; 355 U.S. 852	1
Shupe v. Rose's Stores, Inc.; 213 Va. 374	1
United Construction Workers v. Laburnum; 194 Va. 895; 347 U.S. 656.....	6
 STATUTES:	
Virginia Code	
8-630.....	1
40.1-58 to 40.1-69.....	4
 Corpus Juris Secundum	
Constitutional Law Vol. 16, 213 (2)	1
Libel and Slander Vol. 53, 1	2

QUESTIONS PRESENTED ON APPEAL

1. APPELLANTS ASSERT THE STATUTE (Virginia Code 8-630) AS AUTHORITATIVELY CONSTRUED IS UNCONSTITUTIONALLY OVERBOARD AND VAGUE.

(a) Overbreadth.

The Appellants in contending that the Virginia Statute is unconstitutional for overbreadth rely upon *Gooding vs. Wilson*, 405 U.S. 518 (1972) wherein a Criminal Statute of the State of Georgia was held unconstitutional. This decision by a divided Court with two members not participating, turns upon the construction placed upon the Statute by the Georgia Courts and upon the Criminal aspect of the statute involved. The Supreme Court of Virginia has held that a civil action brought under Code Section 8-630, the insulting words statute, is one for libel and slander and the common law rules for slander are to be applied even though the language used is defamatory on its face. *M. Rosenberg & Sons vs. Craft*, 182 Va. 512; 528; 29 S.E. (2nd) 375, 382-83 (1944), *Carwile vs. Richmond Newspapers, Inc.*; 196 Va. 1, 6, 82 S.E. 2nd 588, 591 (1954) *Shupe vs. Rose's Stores Inc.* 213 Va. 374. The gist of an action under the Virginia Statute of Insulting Words is the insult to the feelings of the offended party, *Cook vs. Patterson Drug Co.* 185 Va. 516, and the insult is the basis for the action; *Brooks va. Calloway*; 12 Leigh (39 Va) 466. The criminal statute in the *Gooding* case was held unconstitutional as being vague and overbroad because it had not been narrowed by Georgia Appellate Courts to apply only to fighting words which by their very utterance--"tend to incite an immediate breach of peace."

The Virginia Statute of Insulting Words as do similar statutes in most of the states, exist independent of any labor dispute. The constitutionality of such statutes has been accepted by the Courts over the years. See "Corpus Juris Secundum Constitutional Law," Vol. 16, 213 (2) citing in support of the general rule that defamatory utterances are not within the area of constitutionally protected speech and writing: *Roth vs. U.S.*; 77 Sp.Ct. 1304; 354 U.S. 476; 1 L Ed. 2nd 1498, rehearing denied 78 Sp.Ct. 8; 355 U.S. 852,

New York Times Co. vs. Sullivan 84 Sp.Ct. 710; 376 U.S. 254.
Linn vs. Plant Guard Workers of Am. Local 114; 86 Sp.Ct.
 667; 383 U.S. 53.

The difficulty of defining libel has often been referred to and it has been said that attempts to define libel although practically innumerable have never been so comprehensive and accurate as to comprehend all cases that may arise. "Corpus Juris Secundum Libel and Slander, Vol. 53, Sec. 1." In the interpretation of words "slanderous" under the Virginia Statute of Insulting Words the Common Law rules for slander are to be applied. The foundation of such actions for defamation is the injury done to reputation; that is injury to character of an individual whereas in *Gooding* the foundation upon which criminal action was based was fighting words which tend to incite an immediate breach of peace and the failure to define these words resulted in the statute being declared unconstitutional.

(b) Vagueness

In addition to overbreadth it is contended that the Virginia Statute of Insulting Words Virginia Code 8-630 is also void for vagueness. In *Coates vs. Cincinnati*; 402 U.S. 611 relied upon by Appellants, the use of word "Annoy" in connection with a criminal offense making it unlawful to assemble on the sidewalks in a manner annoying to people was vague because it subjected right of assembly to an unascertainable standard of conduct; for what may be annoying to one person may not be annoying to others. The value protected by libel laws are (1) the desire of the individual to preserve a certain privacy around his personality from unwarranted intrusions and (2) a desire to preserve his public good name; *Rosenbloom vs. Metromedia*; 403 U.S. 29. It has been held that society has a strong interest in preventing and redressing attacks on reputation. *Rosenblatt vs. Baer*; 383 U.S. 75, 87.

The injury in libel and slander is to the feeling and reputation of the individual. In *Rosenblatt vs. Baer*; 383 U.S. 75, 93, Justice Stewart in note on page 93, refers to the following:

"Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder. They live within the genuine orbit of the common law, and in the distribution of American Sovereignty they fall exclusively within the jurisdiction of the states."

The Statute asserted to be unconstitutional for vagueness as interpreted is but an extension of the common law which is within the jurisdiction of the State.

The objection as to vagueness of this statute and of overbreadth are not applicable under the construction and limitations of the Supreme Court of Appeals of Virginia.

2. APPELLANTS ASSERT THE STATUTE AS APPLIED IS UNCONSTITUTIONAL BECAUSE THE PUBLICATION PENALIZED THEREUNDER IS PROTECTED BY THE FIRST AMENDMENT.

It is the contention that dissemination of facts of a labor dispute must be regarded in the area of free discussion and that identity of the Appellees as non members comes within such information. Had the Appellants gone no further than disseminate such information, no suit for libel would be involved. However, the Appellants went far beyond identifying the Appellees as non members; for they maliciously published of and concerning the Appellees that they were traitors and men of such low character and rotten principles that they should be despised by their fellow workers. This Court in *Linn vs. United Plant Guard Workers*, 383 U.S. 53; 86 Sp.Ct. 657; 15 L Ed 2nd 583 (1966) stated:

"We conclude that where either party to a labor dispute circulates false and defamatory statements during a Union organizing campaign the Court does have jurisdiction to apply state remedies, if complainant pleads and proves that the statements were made with malice and injured him."

It is said by Appellants that the fact the Appellees were non members of Union was a matter of general interest so

as to give Union protection under *New York Times vs. Sullivan*; 376 U.S. 259.

The Appellees had a right under the Virginia "Right To Work Law" Code Section 40.1-58 to 40.1-69 to decide for themselves whether they would join the Union. Appellees were not "public officials" nor "public figures" and whether they did or did not join Union did not present an issue of public or general concern. Hence *New York Times and Rosenbloom* are not applicable.

Appellants say the words used were nothing more than mere rhetorical hyperbole and that no one would have taken same other then as such. To accuse one of having "rotten principles" of "lack in character" of "treason" is beyond rhetorical hyperbole and would be understood as being libelous and it was so understood by the jury under appropriate instructions. It is the very type of maliciousness that was contemplated in the *Linn* case and for which Union must be answerable. The very fact Union asserts that the statements were published to exert pressure on Appellees to compel them to join Union by holding them up to ridicule before their fellow workers indicates not only the malice involved but also the deliberate intent to slander Appellees.

Appellants complain that the judgment if allowed to stand will have a far reaching impact on the labor movement. This Court however in *Linn* laid down the ground rules to govern the conduct of Union stating at page 83:

"But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned and Unions should adopt procedures calculated to prevent such abuse."

What Union did in this instance was done deliberately with a calculated purpose of doing exactly what this Court said Union could not do; that is engage in the malicious utterance of defamatory statements intended to hurt and harm Appellees to compel them to join Union.

Union's contention in the final analysis is basically a disagreement with the *Linn* decision. In essence Union asks that *Linn* be overruled.

3. **APPELLANTS ASSERT HOLDING THE DEFAMATION ACTIONABLE UNDER THE VIRGINIA STATUTE OVERSTEPPED THE LIMITS IMPOSED BY FEDERAL LABOR LAW.**

The Appellants contend that the Court misinterpreted *Linn's* reference to defamatory statements made with malice. Contrary to Appellants assertion *Linn* does say that the malicious publication of defamatory statements does not of itself constitute an unfair labor practice. The NLRB is concerned with the effect upon a representative election, while state remedies are designed to compensate the victim. *New York Times* was prior to *Linn* and in laying down the guide lines in *Linn* the Court did so with awareness of what it had said.

The Court did in *Linn* permit recovery of damages in a state cause of action where defamatory statements were published maliciously and caused damage to the complainant.

For the foregoing reasons the Appellants contention that the defamation actionable under the Virginia statute overstepped the limits imposed by Federal Labor Law is without merit.

4. **APPELLANTS ASSERT THE DAMAGE AWARD WAS EXCESSIVE**

In *Linn Supra* 383 U.S. at 65-66, this Court set out the items of damages that could be considered by a jury as follows:

"We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law."

It is required that the defamed party establish that he has suf-

ferred some sort of compensable harm as a prerequisite to the recovery of punitive damages. Certainly by the evidence produced at the trial, the Appellees showed such compensable harm as is specifically mentioned in *Linn*. The Supreme Court of Appeals of Virginia in its opinion points out the compensable damage which was proved.

In the *Linn* case, the Government as *amicus curiae* urged this Court to go further and limit liability to "grave" defamations - those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct. This Court did not agree.

In the case at bar, the Appellees were accused of being traitors to God, country, family and class. If this Court had adopted the Government's contention, the Appellees at hand would have qualified under "grave defamations". The crime of treason in Virginia being punishable by death under Virginia Code Section 18.1-418. The Supreme Court of Virginia has held in *United Construction Workers vs. Laburnum*, 194 Va. at 895, affirmed by this Court at 347 U.S. 656, that "there is no fixed standard for measuring exemplary or punitive damages, and the amount of the award is largely a matter of discretion with the jury."

**RESPONSE TO
BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE**

The AFL-CIO "amicus curiae" brief concedes that the state courts do have jurisdiction to entertain defamation suits arising from a union campaign to organize workers.

They state further that the substantive law the states may apply in exercising jurisdiction is "limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false," citing *Linn* 383 U.S. at 60-61. Once again, mention is made of the fact that the publication conveyed to the reader the fact that the Appellees were traitors and men of such low

character and rotten principles that they should be despised by their fellow workers. These statements amounted to facts that certainly were false and were printed with utter disregard of their truity or falsity in an attempt to hold the Appellees up to ridicule in the eyes of fellow workers.

The Union would have this court believe that the libel printed of and concerning the Appellees was "rhetorical hyperbole". The Secretary of Local Branch No. 496 however, testified that he could not state whether or not the Appellees were traitors. He then stated, "Since the plaintiffs were getting the benefits of the union without joining, I think they have rotten principles". Certainly the article written concerning the Appellees and the testimony of the local union's secretary both bear out the fact that this publication consisted or more than mere "rhetorical hyperbole".

The AFL-CIO Brief asserts the trial Court did not follow *Linn*. The opinion of the trial Judge indicates full awareness of *Linn* and its doctrine. Except for the assertion that the *New York Times* rule applies and that the words were mere rhetorical hyperbole, the amicus curiae does not point out where the Court failed to follow *Linn*. While AFL-CIO amicus curiae states they are not asking a reconsideration of *Linn*; they are asking the Court to adopt standards which the Court, did not adopt in *Linn* and which would have the effect of changing the guide lines laid down in *Linn*.

CONCLUSION

For the reasons set forth above the Motion To Dismiss the Appeal should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response and Motion To Dismiss Appeal and Response to Brief of AFL-CIO, amicus curiae have been served this 4th day of May, 1973, by first-class mail, postage prepaid, upon;

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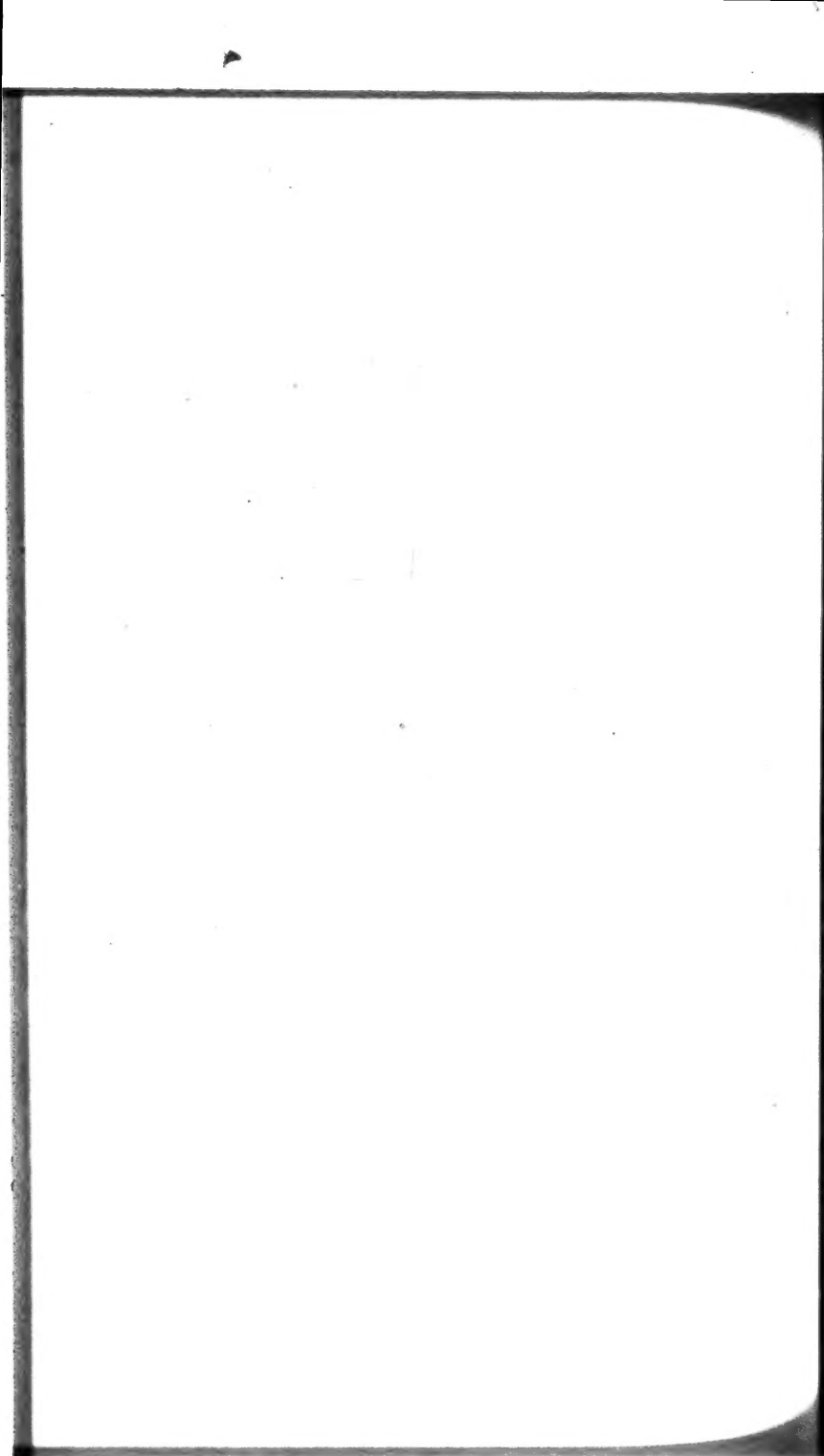
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All parties required to be served have been served in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

S/

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AUG 6 1973

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

Supreme Court, U.S.

FILED

OCT 9 1973

MICHAEL RODAK, JR., CLERK

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO, and NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO,

Appellants,

—v.—

HENRY M. AUSTIN, L. D. BROWN and
ROY P. ZIEGENGEIST,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VIRGINIA

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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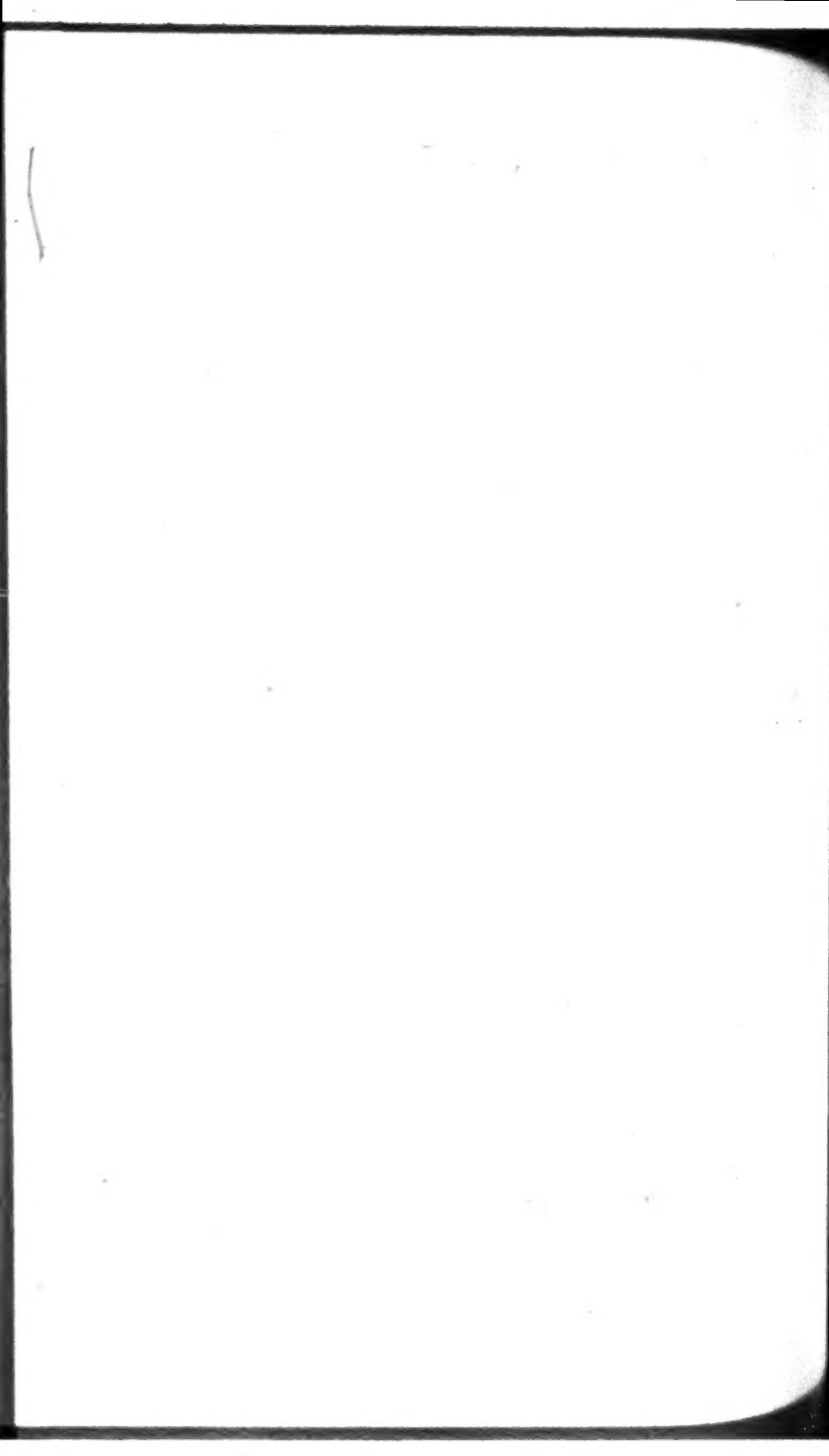
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INDEX

	PAGE
MOTION FOR LEAVE TO FILE BRIEF <i>Amicus Curiae</i>	1
Brief of <i>Amicus Curiae</i>	3
Opinion Below	3
Statute Involved	4
Statement of the Case	4
Questions Presented	5
Summary of Argument	6
ARGUMENT:	
I. The Virginia "insulting words" statute which, on its face and as construed, permits civil damage recovery for the utterance of nondefamatory "insulting words" without requiring an immediate danger of breach of the peace and without adequately defining "insults" is overbroad and vague in violation of the First and Fourteenth Amendments to the Constitution	8
A. The statute is overbroad	8
B. The Virginia insulting words statute is void for vagueness	13

II. Under <i>New York Times Company v. Sullivan</i> and <i>Rosenbloom v. Metromedia, Inc.</i> , the Virginia insulting words statute is unconstitutional as applied to the publication of a monthly union newsletter which for purposes of encouraging union membership identified non-union members in a "List of Scabs" and described "scabs" in a critical and derogatory manner	15
A. The publication concerned a matter of public interest	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:

<i>Ashton v. Kentucky</i> , 384 U.S. 195 (1966)	13
<i>Broadrick v. Oklahoma</i> , — U.S. —, 41 U.S.L.W. 5111 (June 25, 1973)	10
<i>Carwile v. Richmond Newspapers, Inc.</i> , 196 Va. 1, 82 S.E.2d 588 (1954)	11
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	10
<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971)	13
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130 (1967)	19
<i>Darnell v. Davis</i> , 190 Va. 701, 58 S.E.2d 68 (1950)	11
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	8, 9, 10, 13
<i>Greenbelt Cooperative Publishing Association v. Bresler</i> , 398 U.S. 6 (1970)	7

	PAGE
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	6, 7, 9, 15, 16, 17
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	18
Rolland v. Batchelder, 89 Va. 664, 5 S.E. 695 (1888)	11
Rosenbloom v. Metromedia Inc., 403 U.S. 29 (1971)	7, 15, 16, 17, 18, 19
Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937)	17
Thornhill v. Alabama, 310 U.S. 88 (1940)	17
Time, Inc. v. Hill, 385 U.S. 374 (1967)	16, 18
W. T. Grant & Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928)	8
<i>Constitutional Provisions:</i>	
United States Constitution	
First Amendment	5, 6, 8, 9, 13, 16, 18, 19
Fourteenth Amendment	5, 6, 8, 9
<i>State Statutes:</i>	
1942 Mississippi Code Annotated §1059 (1957)	8
Code of Virginia §8-630 (1957)	4, 8
Code of West Virginia §55-7-2 (1946)	8
<i>Other Authority:</i>	
Note, "Defamation in Virginia—A Merger of Libel and Slander," 47 Va. L. Rev. 1116 (1961)	8, 12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO, and NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO,

Appellants,

—v.—

HENRY M. AUSTIN, L. D. BROWN and
ROY P. ZIEGENGEIST,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VIRGINIA

**MOTION FOR LEAVE TO FILE BRIEF
*AMICUS CURIAE***

The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in this case. The appellants' attorney granted consent by letter, which has been filed with the Clerk. One of appellees' attorneys denied consent by phone.

The American Civil Liberties Union is a non-profit, non-partisan organization whose current membership is in excess of 180,000. During its fifty-three year existence, the ACLU has been concerned with a wide range of issues arising under the Bill of Rights, but its first interest has always been and remains the First Amendment.

This case involves a statute which, in our opinion, decreases the freedom of speech available to the citizens of the State of Virginia. We believe it lays a direct burden upon the rights protected by the First Amendment and because of its overbreadth and vagueness discourages the right to speak freely on controversial matters of public and private concern.

We believe our brief will be of assistance to the Court in the resolution of the issue before it.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movant

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VIRGINIA

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
*AMICUS CURIAE***

The interest of *amicus* is set out in the Motion For Leave
to File, *supra*.

Opinion Below

The opinion of the Supreme Court of the State of Vir-
ginia is reported at 213 Va. 377, 192 S.E.2d 737.

Statute Involved

Code of Virginia §8-630 (1957):

Action for insulting words.—All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable.

Statement of the Case

Suit under the Virginia insulting words statute followed publication of the following matter in the monthly newsletter of the Old Dominion Branch No. 496 of the National Association of Letter Carriers:

THE SCAB

Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*.

A scab is a two-legged animal with a cork-screw soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

LIST OF SCABS

Henry Austin	Richard Leonard
Lewis Bolton	F. E. Moriconi
E. D. Brown	Judson Proctor
L. D. Brown	Wilford Tevis
R. L. Broughman	Hunter Whitlock
R. L. France	R. L. Worsham
Roger Hanson	R. P. Ziegegeist
Randolph Jacobs	

Questions Presented

1. Whether the Virginia insulting words statute on its face and as construed is unconstitutionally overbroad in that it is not limited in its application to "fighting words" which threaten an immediate breach of the peace or to words which under the First and Fourteenth Amendments may otherwise be proscribed.

2. Whether the Virginia insulting words statute is unconstitutionally vague.

3. Whether under *New York Times Company v. Sullivan* and its progeny, the Virginia insulting words statute is unconstitutional as applied to the publication of a monthly union newsletter which for purposes of encouraging Union membership truthfully identified non-union members in a "List of Scabs" and described "scabs" in a critical and derogatory manner.

Summary of Argument

At issue in this case is the fundamental question of the validity, under the First and Fourteenth Amendments, of a state statute providing a private civil damage remedy for words which "from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace." The circumstance—a labor dispute—in which the alleged insults (characterized as defamatory by the Virginia Supreme Court) were published brings into sharp focus the adverse effect on vigorous exercise of first amendment freedoms that will inevitably result if the Virginia Supreme Court's decision is permitted to stand.

In point I, we examine the Virginia statute, on its face and as construed, to show that the statute is both overbroad and vague. With respect to overbreadth, it is clear that the statute (which has been applied irrespective of the fact that no immediate, violent encounter is threatened) has not been limited in its application to "fighting words" as defined by this Court. Nor can it be said with any assurance that the Virginia courts have construed this statute as applicable only to words which are *both* insulting and defamatory. The unavailability of such limiting construction is made clear by the charge to the jury, approved by the

Virginia Supreme Court in this case. With respect to the vagueness of the word "insults" it is apparent that the statute which refers to the words "usual construction" and "common acceptation" contains no standard at all to guide either a prospective defendant or a jury. The jury charge in this case also demonstrates that no state court construction has eliminated the inherent vagueness of the Virginia statute. Since the statute is both vague and overbroad, it cannot constitutionally be applied to appellants irrespective of whether their publication might be actionable under a properly drawn statute.

Point II contends that the Virginia insulting words statute is unconstitutional as applied to the Union publication at issue in this case. The statements on which appellants' liability was based were made in the context of a labor dispute and are constitutionally protected as speech concerning a matter of public interest. Accordingly, under the decisions of this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971), appellees could recover civil damages for insulting words, if at all, only if appellants' publication contained defamatory false statements of fact made with actual malice—that is, with knowledge that the statements were false or with reckless disregard of truth or falsity. We argue that the publication at issue in the case contained no defamatory false statements of fact but only metaphor and hyperbole which, under *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), could only have been understood as such and could not, constitutionally, be labelled defamatory. Furthermore, the Virginia Supreme Court's failure to apply the constitutional standards of "actual malice" and "clear and convincing proof" compels reversal of the judgment in this case.

ARGUMENT

I.

The Virginia "insulting words" statute which, on its face and as construed, permits civil damage recovery for the utterance of nondefamatory "insulting words" without requiring an immediate danger of breach of the peace and without adequately defining "insults" is overbroad and vague in violation of the First and Fourteenth Amendments to the Constitution.

A. The statute is overbroad.

The Virginia "insulting words" statute, formerly known as the "anti-dueling statute,"¹ provides a civil damage remedy for "all words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace." Code of Virginia §8-630 (1957). Under *Gooding v. Wilson*, 405 U.S. 518 (1972), the facial overbreadth of the Virginia statute is beyond dispute.

In *Gooding*, the Georgia statute attacked for overbreadth and vagueness proscribed the use "to or of another, and in his presence, [of] opprobrious words or abusive language, tending to cause a breach of the peace. . . ." Mr. Justice Brennan, writing for the majority, stated: "[This statute] punishes only spoken words. It can therefore withstand . . . attack upon its facial constitutionality only if,

¹ Note, "Defamation in Virginia—A Merger of Libel and Slander," 47 Va. L. Rev. 1116, n. 5 (1961). See also *W. T. Grant & Co. v. Owens*, 149 Va. 906, 141 S.E. 860 (1928). In addition to Virginia only Mississippi and West Virginia provide a civil damage remedy for insulting words. 1942 Miss. Code Ann. §1059 (1957); Code of W. Va. §55-7-2 (1946).

as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." 405 U.S. at 520 (citations omitted).² On its face, the Virginia statute, which applies to insulting words even if uttered outside the presence of the offended party, is broader than the Georgia statute which, by its express terms, applied only to words uttered in the complaining party's presence.³

Since Virginia's proscription against "words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace" is even broader than Georgia's prohibition against "opprobrious words or abusive language tending to cause a breach of the peace," the Virginia statute can be upheld, *a fortiori*, only if "it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." *Gooding v. Wilson*, 405 U.S. at 520 (citations omitted). In considering this question of overbreadth, "it matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute,"

² The fact that the Virginia statute imposes a civil rather than a criminal sanction in no way dilutes the applicability of the overbreadth doctrine in this case. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Moreover, as this Court observed in *New York Times Co. v. Sullivan*, the chilling effect of civil damage actions may be greater than that of criminal prosecution. *Id.* at 277-79.

³ The addition in the Virginia statute of the words "usual construction and common acceptance" does not lessen the facial overbreadth of the Virginia statute, since these terms are themselves inherently vague, see *infra* at 13-14, and in no way avoid the statute's application to threats of future as well as present breaches of the peace.

Gooding v. Wilson, *supra* at 520;⁴ rather, the relevant inquiry is whether the Virginia Courts have managed to convert an otherwise overbroad statute into one that is not susceptible of application to constitutionally protected speech.

In *Gooding*, the Court held that the Georgia statute's overbreadth had not been cured by state court construction since the statute had not been applied only to "fighting words," that is, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Gooding v. Wilson*, *supra* at 524 [quoting from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)]. In support of its conclusion, the Court in *Gooding* noted that the dictionary definitions of "opprobrious" and "abusive" were very broad, and included as to the former words "conveying or intended to convey disgrace" and, as to the latter, "harsh insulting language." The Court also found that the Georgia state cases had applied the statute to words covered by these dictionary definitions, although they were not words "which by their very utterance . . . tend to incite an immediate breach of the peace." 405 U.S. at 525 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572).

The following words have been characterized as "insults" under the Virginia statute: a written statement that plaintiff had trespassed on defendant's property and had

⁴ We contend that appellants' publication clearly was constitutionally protected. See, *infra*, at 15-19. However, even if, ultimately, it were not so characterized, this case is one in which, under *Broadrick v. Oklahoma*, — U.S. —, 41 U.S. Law Week 5111 (June 25, 1973), an overbreadth attack is available. The Virginia statute reaches only speech, not conduct, and the statute's overbreadth is both real and substantial.

acknowledged doing so;⁵ a newspaper article charging a lawyer with having committed acts of professional misconduct;⁶ the posting of notices in defendant's retail store that no checks or charges were to be accepted from plaintiff;⁷ and a letter sent by defendant to a neighbor's wife falsely intimating that she had invited the writer to meet her.⁸ As the Virginia statute has been construed by the Virginia state courts, therefore, it is clear that it is not limited to "face to face words" which naturally tend to provoke violent resentment on the part of the addressee.

Furthermore, the statute is overbroad not only because it is not confined to fighting words, but also because it is not even confined to words which are defamatory.

In rejecting the appellants' contention that the insulting words statute was overbroad and vague, the Virginia Supreme Court seems to have held that, under prior decisions, actions for insulting words have been treated in all respects as actions for libel or slander.⁹ In fact, however, neither in this case nor in previous cases, has the insulting words statute been consistently so construed.

It is clear from the following language contained in the jury charge, which was approved by the Virginia Supreme

⁵ *Darnell v. Davis*, 190 Va. 701, 58 S.E.2d 68 (1950). In *Darnell*, although the words characterized as defamatory by the court were held actionable as insults under the statute, the court concluded that they were absolutely privileged.

⁶ *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954).

⁷ *Shupe v. Rose's Stores, Inc.*, 213 Va. 374, 192 S.E.2d 761 (1972).

⁸ *Rolland v. Batchelder*, 89 Va. 664, 5 S.E. 695 (1888).

⁹ However, in a suit under the statute, it is clear that publication to a third party is not required.

Court on appeal, that the jury in the instant case was free to find words "insulting" under the statute although such words would not be defamatory:

The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace. (213 Va. 377, —, 192 S.E.2d 737, — (1973).)

The jury was thus instructed that if a word is insulting, it is defamatory, rather than that if it is defamatory, it is insulting. For this reason, it cannot be claimed that the Virginia statute has been construed as applicable only to cases involving common law defamation. Moreover, the trial court treated the appellees' action as brought under the Virginia insulting words statute, and not as a blend of the common law action for libel and the insulting words. Thus, this case was neither commenced nor tried as a libel case.¹⁰

If, except for the requirement of publication, the Virginia courts in fact allow recovery in actions under the statute only where recovery is permitted at common law, and apply the same rules of law to both classes of cases, there would be no purpose served by proceeding, as appellees have in this case, under the statute, rather than at common law.

¹⁰ One commentator has concluded that despite the Virginia courts' general statements that actions for insulting words are actions for libel or slander, the courts have permitted recoveries under the insulting words statute where no recovery would be permitted under common law. See, Note, "Defamation in Virginia—A Merger of Libel and Slander," 47 Va. L. Rev. 1116, 1129 (1961).

It does not seem unwarranted, therefore, to conclude that some advantage may well inhere in an election to proceed under the statute and that the statute has not, in fact, been narrowly construed.

B. *The Virginia insulting words statute is void for vagueness.*

The insulting words statute at issue in this case is void for vagueness since it fails to define the insults made actionable other than by reference to "usual construction" and "common acceptance." There is no ascertainable standard by which either the speaker, writer or a jury can evaluate whether the words alleged to be actionable under the statute are in fact proscribed.

Under principles long established by this Court, a statute which subjects the exercise of First Amendment rights to an unascertainable standard will be held void for vagueness. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Ashton v. Kentucky*, 384 U.S. 195 (1966). See also *Coates v. Cincinnati*, 402 U.S. 611 (1971). Although "vague laws in any area suffer a constitutional infirmity . . . [w]hen First Amendment rights are involved, . . . [the Court will] . . . look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. at 200. Examination of the standard applied to the appellants' publication by the trial court in its charge to the jury reveals that no precise delimitation of words actionable under this statute has been forthcoming. In pertinent part, the trial court, in its charge to the jury, stated:

The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that

such statements were in words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

• • • • •

In determining whether or not the language complained of is insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual construction and common acceptance under the circumstances of this case. That is, in a labor dispute.

• • • • •

[M]ere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more does not amount to defamation. A certain amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law

The last quoted paragraph of the instruction compounded the already present vagueness and confusion, since it failed to provide the jury with any notion of how much "vulgar name calling" is non-defamatory. The trial court also failed to furnish the jury with any indication of the point at which the vulgar name calling "tolerated by the law" had gone so far as to be actionable. No requirement of a finding of immediate danger of face to face violent confrontation was imposed, hence, not even the "fighting words" doctrine was available to cure the statute's vagueness.

II.

Under *New York Times Company v. Sullivan* and *Rosenbloom v. Metromedia, Inc.*, the Virginia insulting words statute is unconstitutional as applied to the publication of a monthly union newsletter which for purposes of encouraging union membership identified non-union members in a "List of Scabs" and described "scabs" in a critical and derogatory manner.

We have argued that the statute on its face is overbroad and vague, and that no limiting construction, either in terms of "fighting words" or "defamation," has been forthcoming from the Virginia courts. In the event, however, that the Court should conclude that the application of the insulting words statute has been limited by prior cases to fighting words or defamatory words, then the statute must be held unconstitutional as construed and applied to appellants.

The Union publication which was the subject of the civil damage action in this case concerned a matter of public interest—the relationship between union and non-union members, and the union's evaluation of some employees' refusal to join the union although enjoying benefits won for all employees by the union. Consequently, the Virginia Supreme Court erred in refusing to apply the constitutional standards required by *New York Times Co. v. Sullivan*, *supra*, and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that appellees, although private individuals, may not recover civil damages unless it appears by clear and convincing proof that the statements were false and defamatory and were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether or not they were false.

A. The publication concerned a matter of public interest.

Rosenbloom v. Metromedia, Inc. makes clear that where matters of public interest are concerned, the state law remedy for defamatory false statements must yield to the constitutional protections of the First Amendment, whether plaintiffs are public officials or figures or private individuals. Since it was conceded in *Rosenbloom* that the subject matter of the news broadcast in question—a public campaign to enforce the obscenity laws—concerned an issue of public or general concern, the Court was not then called upon to delineate the reach of that term. 403 U.S. at 40-41. However, *Rosenbloom* and its progenitors, *New York Times Company v. Sullivan, supra*, and *Time, Inc. v. Hill*, 385 U.S. 374 (1967), provide the analytical framework for resolving the question whether appellants' publication concerned a matter of public interest.

The basic principle underlying *New York Times Company v. Sullivan*, *Time, Inc. v. Hill* and *Rosenbloom v. Metromedia, Inc.*, is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270 (citations omitted). While political speech concerning public officials is at the heart of the First Amendment, it has been made perfectly clear that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc. v. Hill*, 385 U.S. at 388. Thus "[o]ur efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense," *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 41, and freedom of discussion "must embrace all issues about

which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

"The dissemination of information concerning the facts of a labor dispute" has long been "regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. at 102. See also *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937). As the Court observed more than thirty years ago, "The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern." *Thornhill v. Alabama*, *supra* at 103.

Relations and disputes between union and non-union members are no more insulated from discussion than are relations between labor and management. Conflicts may arise in a variety of ways within the general field of labor relations, and although under *Rosenbloom*, the individual, whether a public or private person, is not entirely stripped of his interest in privacy as to certain matters, insofar as his activities fall within the area of public interest or concern, the constitutional protections of *New York Times Company v. Sullivan*, *supra*, apply. *Rosenbloom v. Metro-media, Inc.*, 403 U.S. at 44, n. 12, and at 48. In this case, the comments made by appellants in the union newsletter pertained only to the issue of union membership and the lack of esteem in which non-union members are held. This publication, in short, did not discuss either intimate and personal details of appellees' lives or matters beyond those of legitimate public concern.

The attempt made by the Virginia courts to insulate from criticism an individual's decision whether or not to join a

union by labelling it a "private decision" and hence outside the *Rosenbloom* public interest test, ignores the clear holdings of this Court that the focal point in cases of this kind is not the distinction between public and private individuals or institutions, but rather the events in which individuals or institutions are involved. Although such a decision may in a sense be a "private" one, its impact is widely felt not only within the union, but also in the larger society. A similar effort by a state court to insulate a public matter from comment and criticism by employing a privacy label was recently rejected by this Court in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Like the petitioner in *Keefe*, appellees would prefer to restrain critical discussion of their activities. But this preference cannot be enforced at the expense of the First Amendment. As the Court stated in *Time, Inc. v. Hill*, "exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." 385 U.S. at 388.

The Virginia Supreme Court also ignored the important role played by a union newspaper in reaching its constituency and informing this important sector of the public of union views and activities. To the extent that the Virginia court's ruling may be read as limiting the *Rosenbloom* public interest test to communications aimed at undifferentiated mass audiences, it ignores the vital and varied nature of the press in the United States. Numerous publications such as union newsletters, campus newspapers and many others are circulated principally to defined sectors of the

public although they may come to the attention of and be of interest to those outside the primary target audience. If such publications, by reason of their special appeal to particular groups, are deprived of the protections applicable to the more traditional mass media, an anomalous situation results. In effect, the more broadly based is the audience reached, the broader is the applicability of the public interest test despite the fact that much of the audience in fact has no special interest in the matters under discussion.

On the other hand, under the Virginia court's decision, to the extent that the publication reaches a narrow but intensely interested and affected portion of the public, the First Amendment's protections are narrowed on the basis of a constricted view of "the public interest" test.

The boundaries of the "public interest" are necessarily broad, and in a pluralistic society such as ours, in which decisions affecting this interest are made through "a complex array of boards, committees, commissions, corporations and associations, some only loosely connected with the Government." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 at 163-64 (1967) (concurring opinion of Mr. Chief Justice Warren, quoted in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 42), a narrow reading of the phrase ignores the essential function of the First Amendment.

CONCLUSION

For the reasons stated above, the decision of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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INDEX TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTE AND EXECUTIVE ORDER INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
A. The Facts	3
B. The Proceedings in the Trial Court	5
C. The Decision Below	8
INTRODUCTION AND SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. The Court Below Erred In Holding <i>New York Times</i> Inapplicable	12
A. The Court below misread <i>Linn</i>	12
B. The court below erred in holding the First Amendment inapplicable	18
II. The Publication In Issue Is Protected Against State Court Damage Suits By The First Amendment and National Labor Law	24
A. Since appellees alleged no facts showing defamatory falsehood, <i>New York Times</i> protects the publication	24
B. The very statements in issue have been held protected under national labor policy	33

	Page
III. The Statute Is Unconstitutionally Overbroad and Vague	35
IV. The Damage Award Was Excessive	43
CONCLUSION	48
SUPPLEMENTAL APPENDIX	1a

TABLE OF CITATIONS

CASES:

AFL v. Swing, 312 U.S. 321 (1941)	23
Alexandria Gazette Corp. v. West, 198 Va. 154, 93 S.E. 2d 274 (1956)	37
Beckley Newspapers v. Hanks, 389 U.S. 81 (1967)	16
Bereman v. Power Pub. Co., 93 Colo. 581, 27 P.2d 749 (1933)	20
Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677 (1963) ...	20
Broadrick v. Oklahoma, 41 U.S.L.W. 5111 (1973)	41
Cafeteria Union v. Angelos, 320 U.S. 293 (1943) .. 11, 13, 15, 18, 21, 27	27
Cantwell v. Connecticut, 310 U.S. 296 (1940)	32
Cambria Clay Products Co., 106 NLRB 267 (1953) .. 11, 33	33
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) . 37, 38	38
Coates v. City of Cincinnati, 402 U.S. 611 (1971) . 38, 42, 43	43
Cohen v. California, 403 U.S. 15 (1971)	27, 32, 38
Cox v. Louisiana, 379 U.S. 536 (1965)	38
Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966)	29
Directors' Guild of America, Inc v. Superior Court, 48 Cal. Repr. 710 (1966)	19, 20
Edwards v. South Carolina, 372 U.S. 229 (1962)	38
Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967) ..	37
Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967)	15
Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964)	15
Garrison v. Louisiana, 379 U.S. 64 (1964)	16, 17, 19, 25, 28, 39
Gertz v. Robert Welch, Inc., No. 72-617	16, 25, 26
Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969) .	15

Table of Contents Continued

iii

	Page
Gooding v. Wilson, 405 U.S. 518 (1972)	35, 38, 39, 41
Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6 (1970)	12, 16, 21, 23, 26, 27, 28, 30, 33, 40, 43
Haycox v. Dunn, 200 Va. 212, 104 S.E.2d 800 (1958)	37
Henry v. Collins, 380 U.S. 356 (1965)	16
Hill v. Florida, 325 U.S. 538 (1945)	34
H. N. Thayer Co., 99 NLRB 1122 (1951), 215 F.2d 48 (6th Cir. 1959)	34
Lewis v. City of New Orleans, 408 U.S. 913 (1972)	37
Linn v. Plant Guard Workers, 383 U.S. 53 (1966)	2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 27, 31, 34, 41, 43, 44, 45, 47
NAACP v. Button, 371 U.S. 415 (1963)	43
New York Times Co. v. Sullivan, 376 U.S. 259 (1964)	8, 9, 10, 11, 14, 15, 16, 17, 18, 24, 25, 27, 29, 32, 35, 39, 40
NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964) (concurring opinion)	24
Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971)	12, 19, 22, 24, 32
Pickering v. Board of Education, 391 U.S. 563 (1968)	25, 33
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	42
R. H. Bouligny, Inc. v. United Steelworkers, 270 N.C. 160, 154 S.E. 2d 344 (1967)	30
Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)	24
Rosenblatt v. Baer, 383 U.S. 75 (1966)	16, 17, 21
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)	16, 19
Rosenfeld v. New Jersey, 408 U.S. 901 (1972)	37
Sanders v. Harris, 213 Va. 369, 192 S.E. 2d 754 (1973)	40
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	24
Senn v. Tile Layers Union, 301 U.S. 468 (1973)	15, 18, 21
Schacht v. United States, 398 U.S. 58 (1970)	42
Schott Metal Products Company, 128 NLRB 415 (1960)	34
Story v. Norfolk-Portsmouth Newspapers, Inc., 202 Va. 588, 118 S.E.2d 668 (1961)	37, 40
Teamsters Union v. Morton, 377 U.S. 252 (1964)	34
Teamsters Union v. Oliver, 358 U.S. 283 (1959)	34
Terminello v. Chicago, 337 U.S. 1 (1949)	38
Terry Coach Industries, Inc., 166 NLRB 560 (1967)	34
Thomas v. Collins, 323 U.S. 516 (1945)	18, 19, 23, 32, 45

	Page
Thornhill v. Alabama, 310 U.S. 88 (1940)	18
Time, Inc. v. Hill, 385 U.S. 374 (1967)	19
Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) ..	26, 29
Time, Inc. v. Pape, 401 U.S. 279 (1971)	37
United Construction Workers v. Laburnum, 194 Va. 872, 75 S.E.2d 694, affirmed, 347 U.S. 656 (1954) ..	44
United States v. CIO, 335 U.S. 106 (1948) (Rutledge J., concurring)	20
United States v. UAW, 352 U.S. 567 (1957)	21
Vaca v. Sipes, 386 U.S. 171 (1967)	33
Ward v. Painters Local 300, 41 Wash. 2d 859 (1950) ..	20
Watts v. United States, 394 U.S. 705 (1969)	26, 32
Wozniak v. Local 1111, United Electrical Workers, 83 LRRM 2575 (Wis. Sup. Ct. 1973)	47
Youngdahl v. Rainfair, 355 U.S. 131 (1957)	34

STATUTES:

Ala. Code Title 14 § 11 (1959)	43
Code of Va., § 8-630, Virginia "insulting words" statute	2
Code of W. Va., § 55-7-2 (1946)	43
Executive Order 11491, 34 Fed. Reg. 17,605 (1969) ..	2
Executive Order 11491, § 12(c)	4
Executive Order 11491, §§ 19(a)(1), 19(b)(1)	24
Ky. Rev. Stat. Ann. § 437-020 (1969)	43
Louisiana Rev. Stat. Ann. §§ 14:103, 14:103.1 (1972 Supp.)	43
National Labor Relations Act, § 2(9), 49 Stat. 450 (1935), 29 U.S.C.A. § 152(9) (1972)	14
National Labor Relations Act §§ 7, 8(a)(1), 8(b)(1) (A), 29 U.S.C.A. §§ 157, 158(a)(1), 158(b)(1)(A) (1965)	24
Labor-Management Relations Act, 1947, § 1(b), 61 Stat. 136 (1947), 29 U.S.C.A. § 141(b) (1973)	15
Norris LaGuardia Act § 13, 47 Stat. 73 (1932) 29 U.S.C. § 113 (1973); 39 U.S.C.A. § 1209(a) (1973 Supp.) ..	15

Table of Contents Continued

v

	Page
Postal Reorganization Act, 84 Stat. 719 (1970), 39 U.S.C.A. § 101 <i>et seq.</i> (1972 Supp.)	3
Postal Reorganization Act, 39 U.S.C.A. § 1201-1209 ..	3, 15
Postal Reorganization Act, 39 U.S.C.A. § 1290(c) (1973 Supp.)	4
Postal Reorganization Act, §§ 10, 15a, 84 Stat. 784, 787 (1970)	3
Va. Code Ann. § 18.1-255 (1960)	47
Va. Code Ann. § 18.1-256 (1973 Supp.)	47
1942 Miss. Code Ann. § 1059 (1957)	43
MISCELLANEOUS:	
Bok, <i>The Regulation of Campaign Tactics Under the National Labor Relations Act</i> , 78 Harv. L. Rev., 38 (1964)	20
Butterfield, <i>The American Past</i> , 190 (1947)	31
Currier, <i>Defamation in Labor Dispute: Preemption and the New Federal Common Law</i> , 53 Va. L. Rev. 1 (1967)	47
Kronenberger, <i>The Cutting Edge</i> , 124 (1970)	30
Prosser, <i>Torts</i> , 46-47 (3d Ed. 1964)	46
Webster's <i>New Twentieth Century Dictionary, Unabridged, Second Edition</i> (The World Pub. Co., 1968), p. 1614	4
Webster's <i>Third New International Dictionary</i> 4:b(1) .	4

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, *Appellants*,

v.

HENRY M. AUSTIN, L. D. BROWN, AND
ROY P. ZIEGENGEIST, *Appellees*.

On Appeal from a Judgment of the Supreme Court
of Virginia

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the Virginia Supreme Court (J. S. 1a-11a)* is reported at 213 Va. 377, 192 S.E.2d 737.

*"J.S." refers to Appellants' Jurisdictional Statement.

JURISDICTION

The judgments below were entered on November 17, 1972 and the Notices of Appeal were filed on December 20, 1972. The jurisdictional statement was filed on February 26, 1973. This Court noted probable jurisdiction on May 29, 1973. Jurisdiction to review the decision below by direct appeal is conferred upon this Court by 28 U.S.C. § 1257(2).

STATUTE AND EXECUTIVE ORDER INVOLVED

Code of Va. § 8-630 (1957) provides: "Action for insulting words.—All words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace shall be actionable."

Executive Order 11491, 34 Fed. Reg. 17,605 (1969), is set out at J.S. 12a-33a.

QUESTIONS PRESENTED

1. Whether *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), precludes, as a matter of national labor policy, a state court award of defamation damages for a statement published in a local union newspaper which accurately identifies certain employees as "scabs" and defines "scab" in pejorative terms.

2. Whether a damage award based upon the aforesaid publication is barred by the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether a state statute which, as authoritatively construed, makes "insulting words" actionable, with-

out a showing of immediate danger of breach of the peace, if the words are uttered with "actual malice," defined as hostility, is unconstitutionally overbroad and void for vagueness.

4. Whether an award of compensatory and punitive damages totaling \$165,000, for publishing the statement in question, is "excessive" within the meaning of *Linn, supra*, 383 U.S. at 65-66.

STATEMENT

A. The Facts

Appellant Old Dominion Branch No. 496 (Branch) is an autonomous local union affiliated with appellant National Association of Letter Carriers, AFL-CIO (NALC). Under Executive Order 11491, and, subsequently, the Postal Reorganization Act and the National Labor Relations Act, the postal authorities at all relevant times have recognized NALC as the national and Branch as the local exclusive collective bargaining representative of city letter carriers in the Richmond area.¹ During the period relevant herein, appellees were city letter carriers whom appellants represented under compulsion of the Executive Order. But appellees were "free riders": they were

¹ Under the Postal Reorganization Act, 84 Stat. 719 (1970), 39 U.S.C.A. § 101 *et seq.* (1972 Supp.), certain provisions of the Postal Reorganization Act and the National Labor Relations Act superseded the cited Executive Order. See 39 U.S.C.A. §§ 1201-1209; Postal Reorganization Act §§ 10, 15a, 84 Stat. 784, 787 (1970). Appellants' representative status and the rights of employees established by the Executive Order remain in effect under the Postal Reorganization Act and contracts negotiated pursuant thereto.

nonmembers who paid no dues or fees to either Branch or NALC.²

In an effort to induce nonmembers like appellees to join, Branch from time to time published the names of nonmembers (including appellees) under the heading "List of Scabs" in the Branch's monthly newsletter.³ The newsletter is distributed by mail to Branch members only (A. 36). Shortly before the June, 1970, issue, plaintiff Austin told Branch President Hutchins "I didn't know what a scab was." (J.S. 39-40, 30-31). In a column in the June issue titled "The Scab," the Branch noted that "[s]ome co-workers are in a quandary as to what a scab is; we submit the following:" (A. 72). "The following," printed above the "List of Scabs," was a well-known piece of trade union literature, generally thought to have been written by Jack London, defining "scab" in highly uncomplimentary terms.⁴

² Neither the Executive Order nor the Postal Reorganization Act permits contracts making union membership a condition of employment. Executive Order 11491, § 12(c) (J.S. 25a); 39 U.S.C.A. § 1209(c) (1972 Supp.).

³ The record shows that, in labor parlance, a "scab" is a nonmember (A. 50-51, 55). See, e.g., *Webster's Third New International Dictionary* "scab," 4:b(1) ("one who refuses to join a union"); *Webster's New Twentieth Century Dictionary, Unabridged, Second Edition* (The World Pub. Co., 1968), p. 1614.

⁴ The column read as follows (J.S. 2a-3a):

"The Scab

"Some co-workers are in a quandary as to what a scab is; we submit the following:

'After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

'A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue.

The June issue was posted on a station bulletin board (J.S. 3a), by whom does not appear. There is no evidence that anyone other than a letter carrier saw it there.

B. The Proceedings in the Trial Court

Appellees filed "Motions for Judgment," *i.e.*, complaints for damages, in the Law and Equity Court of the City of Richmond, Virginia, almost immediately after the article appeared (A. 7). Thereafter, appellants filed demurrers contending that the publication complained of is protected against state court damage suits by the freedom of speech guarantee of the United States Constitution and by federal labor law. The demurrers were overruled in an opinion holding that the suits are governed by the Virginia "insulting words" statute, Code of Va., § 8-630, and that the statute, as applied to the challenged publication, is constitutional (A. 11-20). Defendants thereafter

Where others have hearts, he carries a tumor of rotten principles.

'When a scab comes down the street, men turn their backs and angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

'No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

'Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

'Esau was a traitor to himself, Judas was a traitor to his God, Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.' "

filed timely answers (A. 21-26), affirmatively asserting, *inter alia*, constitutional defenses predicated upon the First and Fourteenth Amendments and the Supremacy Clause of the United States Constitution, and explicitly pleading that the Virginia statute for insulting words "on its face and as construed and applied to the complaint herein in the letter opinion of the Court dated January 21, 1971" (overruling the demurrer) is void for overbreadth and vagueness.

At trial, appellee Austin testified that after he was identified as a scab some of his co-workers stopped speaking to him and otherwise manifested hostility toward him, and that one postal worker's wife called him a "scab" (A. 42-43). Seven months after the article appeared (and after suit was filed), he testified, he got a migraine headache (A. 43). Another appellee, Brown, testified that the article upset him, that he had headaches, and that some of his co-workers called him "scab" and other names (A. 49). The third appellee, Ziegenggeist, testified that after the publication some of his co-workers became "cool" towards him (A. 43). His teenage daughter also testified that after "the case came up" she feared someone might come and harm "us" and that Ziegenggeist and his wife had many arguments (A. 47, emphasis added). There was no other evidence of injury. See J.S. 3a-4a. At the close of plaintiffs' case, and again after all the evidence was in, appellants moved the court to enter judgment in their favor, renewing their constitutional objections. These motions were denied (A. 49-50, 58-59).

The trial court instructed the jury that the occasion on which the statements in question had been made was privileged; that defendants were therefore liable only if they had "abused" the privilege by

making "defamatory" statements with "actual malice"; that statements are defamatory and libelous if they contain "words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace," and that "actual malice" means having been "actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff." (J.S. 9a-10a; A. 92-94). The court denied defendants' request for an instruction defining a malicious publication as one intended "to constitute a [false] representation of fact or facts, as distinguished from an expression of feelings, emotions or opinions, and . . . known by its maker to be false in fact or . . . made without regard or concern for its factual truth." The court explained to counsel that, under Virginia law, hyperbole and statements of opinion, no less than statements of fact, are actionable (A. 60-62, 86-88). No cautionary instruction was given as to the amount of damages. Defendants took appropriate objections and exceptions (A. 46-54, 59-67).

The jury returned a verdict awarding each of the appellees \$10,000 in compensatory damages and \$45,000 in punitive damages. Appellants then moved for judgment, N.O.V., for a new trial, and for a remittitur. These motions, too, were denied (A. 55-56, 69-70).⁵

⁵ Proceedings in a suit filed by another employee whose name appeared in the June, 1970, newsletter have been held in abeyance by stipulation pending the outcome of this appeal.

C. The Decision Below

On appeal, the Supreme Court of Virginia held that the Virginia insulting words statute had been narrowed by state court decisions making the common law rules of slander applicable to actions under the statute, so that defamatory words, if uttered on a privileged occasion, are actionable only upon a showing of "actual malice," as defined by the trial court (J.S. 5a, 10a). The court declared that where the defamatory statement "was made with actual malice" the "public interest in free expression and communication of ideas" does not "outweigh [] the interest of the State in protecting the individual plaintiff from damage to his reputation and social relationships" (J.S. 5a). In the court's view, since the Virginia statute condemns "privileged" statements only if made with "actual malice" it reaches "only those words that are not protected by the First Amendment" (J.S. 5a).

The court also held that the *New York Times*⁶ definition of "actual malice" was inapplicable because that definition extends only to publication of matters of "general or public interest" (J.S. 8a). Since plaintiffs had a right, under both federal and state law, not to join the union, the court reasoned, their refusal to join "was only a private matter and an issue of general concern or public interest was not involved." (*Ibid.*) The court found *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), support for its position, quoting its cession to state courts of power to award damages for "malicious utterance of defamatory statements" in labor disputes (J.S.

⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

6a-7a). But the court ignored *Linn's* adoption by analogy of the *New York Times'* definition of "actual malice" as knowing or reckless falsity, and its holding that state power to award damages for defamatory statements in labor disputes is confined by the *New York Times* standards and its definition of "actual malice."

The lower court also ignored *Linn's* holding that state courts may not award "excessive" damages for defamatory statements in labor disputes (J.S. 11a). It said that "there is no fixed standard for measuring exemplary or punitive damages, and the amount of the award is largely a matter of discretion with the jury." It held that "[w]e cannot say from the evidence presented that the amounts . . . awarded plaintiffs were excessive" (J.S. 11a).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, judgments totaling \$165,000 were entered against the defendants merely for publishing in a local labor union (Branch) newsletter, mailed only to members of the Branch, the fact that plaintiffs (and twelve others) were "scabs"—i.e., nonmembers of the union—together with an old piece of literature generally attributed to Jack London which expresses in colorful language the contempt which union people feel toward "scabs." No false statement of fact was contained in the publication. It is undisputed that plaintiffs were not union members and the word "scab," while not commonly used as an epithet outside labor circles, is simply a synonym for "non-member" and is so defined in leading dictionaries (A. 39-40). The text which accompanied the publication of plaintiffs' names was obviously not intended to be

—and could not reasonably be construed as—a statement or representation of fact. Rather it was simply a literary way of expressing the emotional attitude of union people toward “scabs” in general (J.S. 4a).

The court below held that this expression of disdain for fellow workers who refuse to join a union is actionable under state law despite the First Amendment and the protection which federal labor law extends to adversary speech in disputes over unionization, because it “was made with actual malice” (J.S. 5a, 9a). In its view, where “actual malice,” in the sense of hostility or disregard of the subject’s “rights” (pp. 7, 8, *supra*), is found, “the interest of the State in protecting the individual . . . from damage to his reputation and social relationships” outweighs “the public interest in free expression and communication of ideas” (J.S. 5a).

The court below recognized that this Court reached exactly the opposite result in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny (J.S. 7a-8a). But it distinguished that line of cases on the ground that “whether or not [plaintiffs] joined the union did not present an issue of public or general concern” and that therefore “the public interest in free expression and communication of ideas” did not predominate here (J.S. 8a). The court below failed to recognize that in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), this Court held that the interests of the adversaries and of the Nation in free expression and communication of ideas in labor disputes governed by federal law require imposition of the *New York Times* standards as limitations upon state court jurisdiction over defamatory publications arising out of such disputes. Thus, under *Linn*, the

issue of plaintiffs' nonmembership in the union—a typical labor dispute—is treated as one of “public or general concern.” Accordingly, expressions pertaining to that issue are governed by the *New York Times* standards as a matter of federal preemption, even assuming, *arguendo*, that those standards do not govern directly, under the First and Fourteenth Amendments.

In *Linn*, this Court repudiated common law malice as the touchstone of actionability of defamatory utterances in labor disputes governed by federal law—because it deemed a different and stricter rule necessary to safeguard paramount federal interests in freedom of expression and communication in such disputes. The Court thought the rules enunciated in *New York Times* pertaining to defamation of public officials appropriate. At that time, it was necessary to adopt the *New York Times* tests by analogy, for the scope of that holding had not yet extended beyond “public figures.” Its subsequent extension to issues of “public or general interest,” makes the rule directly applicable to labor disputes, for labor disputes have long been recognized as matters of “public and general concern” and freedom of speech in labor disputes has long been guaranteed by the First and Fourteenth Amendments. *Cafeteria Union v. Angelos*, 320 U.S. 293 (1943).

Whether applied under the Supremacy Clause or under the First Amendment, the *New York Times* standards protect the publication at issue against state defamation actions. Calling nonmembers “scabs,” and disseminating the Jack London definition of “scab,” is protected by national labor policy. *Linn*, *supra*, 383 U.S. at 60-61; *Cambria Clay Pro-*

ducts Co., 106 NLRB 267, 273 (1953). Under *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14 (1970), that definition must be read as colorful hyperbole rather than as constitutionally actionable representations of fact. And under *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), evocation from members of aversion to plaintiffs because of their refusal to join the Union is constitutionally protected despite the "coercive" effect of that aversion upon plaintiffs' decision to remain apart.

Virginia's "insulting words" statute, under which this action was brought, remains unconstitutionally overbroad and vague on its face and as applied, despite the assertion below that constitutionality is attained by confining the statute's application to defamatory utterances actuated by "malice," as defined by the trial court (J.S. 5a). And, by failing to review the award of damages and to find it "excessive," the courts below repudiated the obligation of, and the trust reposed in, state courts by *Linn*.

A R G U M E N T

I. THE COURT BELOW ERRED IN HOLDING NEW YORK TIMES INAPPLICABLE

A. The court below misread Linn

The decision below is in irreconcilable conflict with *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). In *Linn*, this Court narrowly confined the scope of state power "with respect to libels published during labor disputes" (383 U.S. at 57), in order to "guard[] against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the [National Labor Relations]-Act." *Linn, supra*, 383 U.S. at 65.

It sought to assure that recognition of "legitimate state interests" in compensating the victims of "malicious libel" (383 U.S. at 61) would not "interfere with effective administration of the national labor policy" 383 U.S. at 64.

The Court observed at the outset (383 U.S. at 58):

"Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, *vituperations*, *personal accusations*, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with *imprecatory language*. *Cafeteria Union v. Angelos*, 320 U.S. 293, 295 (1943)." (Emphasis added.)

The Court then noted (383 U.S. at 60), that "the [National Labor Relations] Board has given frequent consideration to the type of statements circulated during labor controversies, and that it has given wide latitude to the competing parties." Thus, "in a number of cases the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these [union representation] struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute." 383 U.S. at 60-61.⁷ The Court observed that, on the other hand, the Board "does not interpret the Act as giving either party

⁷ That statement by this Court, together with the line of Board cases it reflects, dictate reversal because it establishes that defendants' publication was protected by federal law, see pp. 34-35, *infra*.

license to injure the other intentionally by circulating defamatory or insulting material *known to be false*" (*id.*, emphasis added).

Under these circumstances, the Court held, state damage actions "limited to redressing libel issued with knowledge of its falsity, or *with* reckless disregard of whether it was true or false" would be "merely a peripheral concern of the Labor Management Relations Act," and allowing them would vindicate "'an overriding state interest' in protecting its residents from malicious libels" 383 U.S. at 61.

The Court pointed out that the considerations underlying *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 270, "weigh heavily here: the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth" (383 U.S. at 63). Accordingly, protection extends to "vehement, caustic and sometimes unpleasantly sharp attacks" (383 U.S. at 62).

In view of the identity of the policy considerations underlying protection of defamation of public officials and those underlying protection of defamation in labor disputes, the Court adopted the *New York Times* rules by analogy, thereby "[c]onstruing the Act to permit recovery of damages in a state cause of action *only* for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false" 383 U.S. at 65. (Emphasis added.)

Linn plainly governs here, for a dispute among postal employees over whether to join a labor union is a "labor dispute" within the meaning of federal law, and the object of the publication in issue was organization. *Linn*, *supra*, 383 U.S. at 61. See National Labor Relations Act § 2(9), 49 Stat. 450 (1935), 29

U.S.C.A. § 152(9) (1973); Labor-Management Relations Act, 1947, § 1(b), 61 Stat. 136 (1947), 29 U.S.C.A. § 141(b) (1973); Norris LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C.A. § 113 (1973); 39 U.S.C.A. § 1209(a) (1973 Supp.); *Senn v. Tile Layers Union*, 301 U.S. 468, 473 (1937); *Cafeteria Union v. Angelos*, 320 U.S. 293.⁸

The courts below recognized that *Linn* is relevant to the instant controversy (J.S. 6a-7a, A. 18). But instead of respecting *Linn*'s holding that state court jurisdiction over defamation in labor disputes extends only to suits for knowing or reckless *falsehood*, the trial court held that falsehood is irrelevant to appellees' cause of action (A. 48). It sent the case to the jury on the theory that the cause of action was one for "malicious libel," i.e., libel "actuated by some sinister or corrupt motive such as hatred, personal spite, ill will or desire to injure the plaintiff or that the communication was made with such gross indifference and recklessness as to amount to wanton or willful disregard of the rights of the plaintiff" (J.S. 10a). The court below affirmed, citing *Linn* itself as authority for state power to proceed on this theory (J.S. 6a-7a).

Linn does, it is true, use the word "malice." See 383 U.S. at 55, 63-64. But the entire thrust of the *Linn* opinion and its adoption of *New York Times Co.*

⁸ Although *Linn*, *supra*, arose under the National Labor Relations Act, rather than under the Executive Order (see note 3, p. 1, *supra*), the Order is essentially equivalent to that Act in both content and purpose, and "is to be accorded the force and effect given to a statute enacted by Congress," as the court below held. (J.S. 6a, n. 1). See *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967). See also *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964); *Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969).

v. *Sullivan* by analogy make perfectly plain that this Court was not using "malice" in its common law sense, 383 U.S. at 61, 63, 65, as the courts below seemed to think, but in the special sense in which malice is used in *New York Times*, i.e., "defamatory statements published with a reckless disregard of whether they were true or false" *Linn*, *supra*, 383 U.S. at 65. Accord, *id.* at 61, 63. Decisions before and since *Linn*, elucidating *New York Times*, have made it perfectly clear that "malice," as that term was defined by the courts below, is not a saving feature of libel actions to which the rule of *New York Times* applies.⁹ *Garrison v. Louisiana*, 379 U.S. 64, 73-74, 77-79 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 9-10 (1970); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 82-83 (1967). The common law malice "test gives insufficient breathing space to First Amendment values." See *Rosenbloom v. Metromedia*, 403 U.S. 29, 52, & n. 18 (1971): "ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard."¹⁰

⁹ In *Gertz v. Robert Welch, Inc.*, No. 72-617, petitioner claims, *inter alia*, that the Seventh Circuit went too far in applying *New York Times* by denying him opportunity to prove that the defamatory statements about him were made with malice in the *New York Times* sense. By contrast, in this case, the courts below denied defendants the benefit of *New York Times* altogether.

¹⁰ Although the "knowingly false" test of *New York Times* is sometimes referred to as "actual malice," it is not to be confused with common law "malice" which also encompasses "hatred, ill will, or enmity or a wanton desire to injure." *Garrison*, *supra*, 379 U.S. at 78. In order to avoid such confusion, this Court has suggested that "jury instructions that are couched only in terms of knowing or reckless falsity, and omit reference to 'actual malice,' would further a proper application of the *New York Times* standard to the evidence." *Rosenbloom*, *supra*, 403 U.S. at 52, n. 18.

In *Garrison, supra*, 379 U.S. at 73, 74, this Court explained:

"Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and ascertainment of truth. * * * Moreover '[i]n charges against a popular political figure * * * it may be almost impossible to show freedom from ill will or selfish political motives.'"

The same considerations, of course, pertain to freedom of speech in labor disputes. Adversaries in those struggles likewise will find it impossible to show freedom from ill will or selfish economic motives.¹¹ Accordingly, whether *New York Times* is viewed as applicable to the publication at issue "by analogy" or "under constitutional compulsion," the "malice" test applied by the court below was improper.¹² *Linn, supra*, 383 U.S. at 65, see *Rosenblatt v. Baer*, 383 U.S. 75, 93, n. 3 (1966) (concurring opinion of Mr. Justice Stewart).

¹¹ Although appellees testified that they declined to join the Union for reasons of principle (A. 45; Supplemental Appendix *infra*, pp. 2a-3a), it is clear that they escaped an economic burden by not paying dues, and that the Union objected to their nonmembership on that ground and on principle. (J.S. 4a, A. 37).

¹² The trial court refused to instruct the jury that it must find malice in the sense of reckless or deliberate falsehood in order to hold appellants liable. (A. 61-62, 87). We show below that on this record no finding of factual falsity could have been made. See *infra*, pp. 24-33. The trial court also refused to give a "clear and convincing proof" instruction (A. 59, 88), and instructed the jury that proof by a preponderance of the evidence sufficed (A. 59, 92). If *New York Times* is applicable, of course, that was clear error. See 376 U.S. at 285-286.

B. The court below erred in holding the First Amendment inapplicable

The court below held *New York Times* inapplicable because, in its view, "the fact that plaintiffs elected not to join the union was only a private controversy, and an issue of general or public interest was not involved." (J.S. 8a). Even if the characterization were true, which it is not, it would not establish the inapplicability of *New York Times* through *Linn*, for that turns only on whether the publication arose out of a "labor dispute," and both courts below conceded that it did. (J.S. 6a-7a; A. 18).

Moreover, as a constitutional matter, "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . .," *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940), and refusal of eligible workers to join a union has been recognized to be a "labor dispute" at least since *Senn v. Tile Layers Union*, 301 U.S. 468, 478 (1937). Identification of eligible workers as nonmembers is "information concerning the facts of a labor dispute . . .," *Thornhill*, *supra*, which the union has a legitimate interest in disseminating to its members and to the public so that they may individually and collectively persuade and use social pressure to induce nonmembers to join. *Senn v. Tile Layers Union*, *supra*; *Cafeteria Union v. Angelos*, 320 U.S. 293 (1943).¹³ As this Court said in *Thomas v. Collins*, 323 U.S. 516, 531 (1945):

"Great secular causes, with small ones, are guarded. The grievances for redress of which the

¹³ In *Senn*, and in *Cafeteria Union*, the Union picketed to "coerce" nonmembers, working employers, to join the union. It thereby identified the objects of its disapproval.

right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

“The idea is not sound therefore that the First Amendment’s safeguards are wholly inapplicable business or economic activity.”

The precise object of the speech in *Thomas* was to persuade workers to join a union. Cf. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 416, 419 (1971). These holdings establish that, for First Amendment purposes, labor disputes are matters of “general or public interest,” as distinguished from “purely private [matters] totally unrelated to public affairs.” *Garrison v. Louisiana, supra*, 379 U.S. at 72.

Plainly, the Constitution guarantees freedom of speech and of the press on matters of mutual interest to the union, its members and the employees it represents. *Thomas v. Collins, supra*. Certainly, since plaintiffs were members of the bargaining unit whom the union was required to represent and serve, their refusal to join the union was a matter of both mutual interest and legitimate concern. Plaintiffs’ nonmembership was as much a matter of mutual interest and legitimate concern to the particular “public” to which the Branch’s newsletter was addressed as the allegedly criminal activities of the plaintiff in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), were to Metromedia’s audience in that case. The group of workers which the union represents is, perforce, itself a kind of community: “Participation in the union’s affairs by the workman compares to the participation of the citizen in the affairs of his community.” *Directors’*

Guild of America, Inc. v. Superior Court, 48 Cal. Repr. 710, 409 P.2d 934, 941 (1966).¹⁴

Even at common law it has long been recognized that defamatory statements of labor organizations addressed to their members concerning matters of common concern are conditionally privileged. *E.g.*, *Bere-man v. Power Pub. Co.*, 93 Colo. 581, 27 P.2d 749 (1933); *Ward v. Painters Local 300*, 41 Wash. 2d 859, 252 P.2d 253 (1950). The effect of *New York Times* is to convert that conditional privilege into a constitutional right, and to substitute for the kind of "malice" which a plaintiff had to show in order to recover at common law a new and narrower concept of "malice"—i.e., a requirement that the plaintiff must show by "clear and convincing proof" that the allegedly defamatory statements were *factually* false, and made with *knowledge or reckless disregard of their falsity*.

Like the common law, the Constitution affords special protection to internal communications of special purpose organizations, such as labor unions and their members. Cf. *Bogash v. Elkins*, 405 Pa. 437, 440, 176 A.2d 677, 679 (1963). Thus, a majority of this Court strained to find § 313 of the Federal Corrupt Practices Act of 1925, 61 Stat. 159 (1947), which in terms prohibited any union "expenditure . . . in connection with any election at which a Senator or Representative . . . are to be voted for . . ." inapplicable to an outlay for the publication of a statement in a union newspaper endorsing a candidate. *United States v. CIO*, 335 U.S. 106 (1948), see *id.* at 107, n. 1; *id.* at 129, 138, 156-159 (1948) (Rutledge J., concurring). The Court stated

¹⁴ Accord, Bok, *The Regulation of Campaign Tactics Under The National Labor Relations Act*, 78 Harv. L. Rev., 38, 68 (1964).

that "if § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members . . . of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality." 335 U.S. at 121.¹⁵

The right to communicate to a special audience about a matter of concern to members of that audience is at the core of the values protected by freedom of speech and press. See *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 11-13 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966). Hence, even in circumstances where some other interest may be thought to outweigh the right to communicate ideas to the public at large, the right to communicate them to a "special audience" cannot be abridged. Plainly, that principle is implicated here where the challenged publication appeared in a union newspaper distributed exclusively to union members who were directly injured by appellees' refusal to join. Identifying the nonmembers to the members was a key facet of the organizing effort. It enabled the union to incite its adherents to lawful action designed to persuade the holdouts to join. This Court held in *Senn* and *Angelos* that the First Amendment protects the right of a union to identify an individual as a non-

¹⁵ By contrast, in *United States v. UAW*, 352 U.S. 567 (1957), this Court, in the face of another constitutional challenge to the same statute, reversed the dismissal of an indictment alleging that a union had sponsored a television broadcast to influence the electorate at large to vote for candidates. The Court expressly relied on the distinction between a publication addressed to the union membership and a broadcast to the public at large. See 352 U.S. at 588-589.

member to the public at large. *A fortiori*, where, as here, that same information is transmitted to union members by their newsletter, the publication cannot be stripped of its Constitutional immunity on the theory that nonmembership is "only a private matter." (J.S. 8a).

Just as a state cannot by *ipse dixit* convert a matter of legitimate interest to others into a purely "private" concern, so it cannot do so on the theory that optional conduct offensive to others is a "right" which the state desires to protect against exercise of First Amendment freedoms. Thus, Virginia could not constitutionally insulate appellees from the lawful impact of Branch's publication on the theory that because they "had the right to decide for themselves whether to join the union," their refusal to join was a purely private matter. (J.S. 8a). That is the teaching of *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), where the defendants circulated a pamphlet criticizing the business practices of a certain real estate broker as "panic selling" and "block busting." The trial court held the leaflet distribution actionable because its primary objective was to bring public pressure on Keefe, the broker, to cease economic activities which were legal under state law. This Court rejected the claim that the Illinois court could constitutionally protect against adverse publicity the "privacy" of Keefe's business practices, 402 U.S. at 419-420. It also held the leaflet distribution constitutionally protected:

"The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a

newspaper Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. These practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419.

In the same sense that plaintiffs had a "right" to refuse to join the Union, Keefe had a "right" to engage in the business practices to which petitioners in that case objected. In neither case could the state constitutionally attach to the "right" immunity from exposure and criticism, however harsh, by those who felt injured and offended by its exercise. In neither case may a state insulate conduct from the exercise of the free speech rights of those adversely affected by mislabelling the controversy a "private matter."¹⁶

This analysis is implicit in *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14 (1970), where opponents publicly denounced as "blackmail" Bresler's "wholly legal negotiating proposals." Their purpose, of course, was to bring pressure on Bresler to change the position on which he had a legal "right" to stand. It is to protect such attempts to influence the lawful conduct of others that the guarantees of freedom of speech and of the press exist. "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S.

¹⁶ Cf. *AFL v. Swing*, 312 U.S. 321, 326 (1941): "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those employed by him."

516, 537 (1945). Cf. *NLRB v. Fruit and Vegetable Packers*, 377 U.S. 58, 76-80 (1964) (concurring opinion).¹⁷

II. THE PUBLICATION IN ISSUE IS PROTECTED AGAINST STATE COURT DAMAGE SUITS BY THE FIRST AMENDMENT AND NATIONAL LABOR LAW

A. Since appellees alleged no facts showing defamatory falsehood, New York Times protects the publication

Applying the rule of *New York Times Co. v. Sullivan* to this case leads ineluctably to the conclusion that the complaints below should have been dismissed.¹⁸ For *New York Times* and its progeny make falsehood the

¹⁷ To the extent that the court below may have thought appellants' attempts at peaceful persuasion subject to prohibition on the ground that they smacked of "coercion" (see J.S. 8a), its essay is foreclosed by the excerpt from *Austin*, quoted *supra*.

Moreover, "coercion" of employees in the exercise of their right not to join unions is an unfair labor practice subject to federal law. See National Labor Relations Act §§ 7, 8(a)(1), 8(b)(1)(A), 29 U.S.C.A. §§ 157, 158(a)(1), 158(b)(1)(A) (1965); Executive Order 11491, §§ 19(a)(1), 19(b)(1). Drawing the line between coercion on the one hand and protected organizational activity on the other is clearly a function committed exclusively to the federal administrative tribunals charged with enforcing that law. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Insofar as the court below may have rested its holding on Virginia's "Right to Work" law (Code of Virginia §§ 40.1-58 to 40.1-69), it obviously erred. Section 14(b) of the National Labor Relations Act, without which state right-to-work laws could not operate, permits the states to protect the "right to work" only against contracts which make union membership a condition of employment. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 104-105 (1963).

¹⁸ *A fortiori*, the trial court should have granted appellants' motions for judgment made at the close of appellees' case, after all the evidence was in, and after the jury reached its verdict (A. 49-50, 58-59, 69-70).

constitutional *sine qua non* of recovery for defamation in the context of public controversy. "... [T]he great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any [utterance] except the knowing or reckless falsehood." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). And this Court wrote in *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968):

"The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him *except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity*. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968). Compare *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a 'matter of public interest' is involved. *Time, Inc. v. Hill*, 385 U.S. 374 (1967)." (Emphasis added.)

Analysis demonstrates that the publication at issue here imports but one statement of fact—that plaintiffs were wilful nonmembers of the union. That factual assertion was true, since the record establishes that a scab is an individual who, like appellees, refuses to join a labor union, p. 4, n. 3, *supra*.¹⁰ The rest, as shown

¹⁰ *Gertz v. Robert Welch, Inc.*, No. 72-617, is to be distinguished on this ground. There the court of appeals assumed that the statement that plaintiff (petitioner in this Court) was a "communist-frontier" was untrue in fact. See 471 F.2d at 802, 806, 807. Cf. *New York Times*, *supra*, 376 U.S. at 288-292. And the impli-

below, is nothing more than expression of the writer's opinion of nonmembers, couched in colorful hyperbole (J.S. 4a); used simply as "figures of speech" (A. 34-35, 37).

The pejorative characterization of "scabs" pertained to an entire class, identified by a single common characteristic—wilful refusal to join or active opposition to a union. It did not purport to be factual description of appellees personally. Thus, the characterization is unmistakably an attack on the position of one side in the controversy over unionization in the form of an unflattering personification of a nonmember. Inevitably, therefore, the record is completely devoid of evidence that anyone in the postal station or anywhere else thought appellees had "water brains" or combination "backbone[s] of jelly and glue," or that they had been accused of the crime of treason. "[E]ven the most careless reader must have perceived that the word[s] used [were] no more than rhetorical hyperbole, vigorous epithet[s] used by those who considered [appellees'] . . . position extremely unreasonable." *Greenbelt, supra*, 398 U.S. at 14. *Seemle: Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971). Cf. *Watts v. United States*, 394 U.S. 705 (1969).

This Court has several times held that unlike "a deliberate or reckless untruth," the Constitution protects "insulting," or "repulsive speech," "rhetorical

cation that Gertz was part of a nationwide conspiracy and the claim that he was "the architect of a gross miscarriage of justice" (471 F.2d at 804), are apparent assertions of fact about Gertz, not obvious hyperbole expressing contempt for the personification of a position disapproved by the publisher. Furthermore, the defamatory publication in *Gertz* was distributed to the public at large, not, as here, only to those most directly affected by the controversy (*ibid.*).

hyperbole," and emotive speech. Such speech, in the context of a labor dispute or other public controversy, cannot be actionable under *New York Times*, absent falsehood. *Linn, supra*, 383 U.S. at 63; *Cafeteria Union v. Angelos*, 320 U.S. 293 (1943) (cited in *Linn*); *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14 (1970); cf. *Cohen v. California*, 403 U.S. 15 (1971).

In *Cafeteria Union, supra*, the Court held constitutionally protected organizational picketing in which the pickets characterized the cafeteria as "unfair"; "insulted customers * * * who were about to enter"; and told them that the cafeteria served bad food, and that by "patronizing" it "they were aiding the cause of Fascism." 320 U.S. at 294. In that case, long antedating *New York Times*, the Court observed (320 U.S. at 295) that "[i]n a setting like the present, continuing representations unquestionably false" would not enjoy constitutional protection, but that "to use loose language or undefined slogans that are part of our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts." Thus the Court distinguished between "falsifying facts," which the Constitution does not protect, and use of "insulting verbiage," which it does.

In *Greenbelt Pub. Assn. v. Bresler, supra*, the defendants had characterized a position which the plaintiff had taken in certain negotiations as "blackmail," and plaintiff urged that he could recover under *New York Times* because ". . . petitioners knew that Bresler had committed no such crime . . ." (398 U.S. at 13). This Court said (398 U.S. at 13, 14):

"* * * [W]e hold that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the

word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review.

* * *

"It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense.⁷ On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

"To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments.

⁷ Under the law of Maryland the crime of blackmail consists in threatening to accuse any person of an indictable crime or of anything which, if true, would bring the person into contempt or dispute, with a view to extorting money, goods, or things of value. See Md. Ann. Code, Art. 27, §§ 561-563 (1967 Repl. Vol.). There is, of course, no indication in any of the articles that Bresler had engaged in anything approaching such conduct."

Bresler governs here, for the publication in suit is nothing more than "rhetorical hyperbole" expressing the writer's contempt for "scabs." Accord: *Garrison v. Louisiana*, *supra*, 379 U.S. at 76 ("racketeer influ-

ences"); *Time, Inc. v. Johnston*, 448 F.2d 378, 384 (4th Cir. 1971).²⁰

These constitutional decisions reflect the more enlightened common law cases. The point is well illustrated by the decision in *Curtis Publishing Co. v. Birdsong*, 360 F. 2d 344, 345 (5th Cir. 1966). There the plaintiffs claimed that a reference to them in a magazine article as "those bastards" constituted "obscene and fighting words of and concerning plaintiffs and reflecting on their personal reputation." The court, however, ordered dismissal of the complaint, stating (at 348):

"It is not entirely clear whether the plaintiffs are alleging that by the use of the phrase 'those bastards' the allegedly libelous article questioned the legitimacy of their birth. However this may be, it is perfectly clear that no reasonable person of ordinary intelligence could believe that the person whom the author of the article was quoting was accusing every member of the Mississippi Highway Patrol who was on duty at Oxford of having been born out of wedlock. *On the contrary it is perfectly apparent that these words were used as mere epithets, as terms of abuse and opprobrium.* As such they had no real meaning except

²⁰ There the court wrote:

"No one reading the article would have assumed that Auerbach was stating that the plaintiff was actually and literally 'destroyed,' during the game being discussed In describing the event, he used phrases of some vividness, used them in a figurative, not literal sense, used a form of hyperbole typical in sports parlance. *New York Times*, in its application, does not interdict legitimate or normal hyperbole To deny to the press the right to use hyperbole, under the threat of removing the protecting mantle of *New York Times*, would condemn the press to an arid, dessicated recital of bare facts." 448 F.2d at 384.

to indicate that the individual who used them was under a strong emotional feeling of dislike toward those about whom he used them. *Not being intended or understood as statements of fact they are impossible of proof or disproof.* Indeed such words of vituperation and abuse reflect more on the character of the user than they do on that of the individual to whom they are intended to refer. It has long been settled that such words are not of themselves actionable as libelous. *Robbins v. Treadway*, 1829, 25 Ky. (2 J.J. Marsh.) 540, 541; *Rice v. Simmons*, 1838, 2 Del. (2 Harr.) 417, 31 Am. Dec. 766; *Dalton v. Woodward*, 1938, 134 Neb. 915, 280 N.W. 215; *Barry v. Kirkland*, 1948, 149 Neb. 839, 32 N.W. 2d 757; *Dorney v. Dairymen's League Cooperative Ass'n*, D.C. N.J. 1957, 149 F. Supp. 615 *Rawlins v. McKee*, Tex. Civ. App. 1959, 327 S.W. 2d 633." (Emphasis added.)²¹

The kind of "rhetorical hyperbole" (*Bresler, supra*), upon which the judgment below rests is hardly novel. "It could probably be shown by facts and figures," said Mark Twain, "that there is no distinctly native American Criminal class except Congress." Kronenberger, *The Cutting Edge* 124 (1970). Hyperbole is typical of

²¹ Similarly, the North Carolina Supreme Court held:

"*Mere vituperation and name calling directed against an employee or vice versa, in the course of an organizing campaign, are not sufficient basis for a recovery of damages for slander or libel. Even where the plaintiff is an individual, some thickness of skin is required for him by the law in the realm of labor disputes, just as in battles in the political arena. Where, however, the false language goes beyond insulting language and is a positive charge of conduct in specific instances and it is made with knowledge of its falsity or reckless disregard of whether it is true or false, damages may be recovered for resulting injury . . .*" *R. H. Bouligny, Inc. v. United Steelworkers*, 270 N.C. 160, 154 S.E. 2d 344, 356 (1967) (Emphasis added).

"uninhibited, robust, and wide open" social debate. For example, after the Civil War, a widely distributed attack on office holders in the South was couched in the following "insulting" language:

"Words are wanting to do full justice to the genus scallawag. He is a cur with a contracted head, downward look, slinking and uneasy gait; sleeps in the woods, like old Crossland, at the bare idea of a Ku-Klux raid.

* * *

"Our scallawag is the local leper of the community [H]e is a mangy dog, slinking through the alleys, haunting the Governor's office, defiling with tobacco juice the steps of the Capitol, stretching his lazy carcass in the sun on the Square, or the benches of the Mayor's Court.

* * *

"... For office, yet in prospective, he hath bartered respectability; hath abandoned business, and ceased to labor with his hands"

Reproduced in Butterfield, *The American Past* 190 (1947). See also *id.* at 251 (reproducing "*The Labor Despot*," a pejorative cartoon and essay attacking union representatives).

This Court has held rhetorical hyperbole to be within First Amendment protection, we submit, in recognition not only of its ubiquity, *Linn, supra*, 383 U.S. at 58, but also of its emotive, and therefore persuasive force. Even the most salty forms of emotive speech are protected from unwarranted state intrusion. Just two years ago, in holding that the words "Fuck the Draft," emblazoned on a man's

jacket, are protected by the First Amendment, the Court explained:

“... we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words often are chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that *emotive function* which *practically speaking*, may often be the more important element of the overall message sought to be communicated.” *Cohen v. California*, 403 U.S. 15, 25-26 (1971) (Emphasis added).

Hyperbole and insult give the expression of feelings and ideas “emotive . . . force,” as *Cohen* graphically illustrates. Cf. *Watts v. United States*, 394 U.S. 705 (1969). And “emotive . . . force” is an important element in seeking “to persuade to action.” *Thomas v. Collins*, *supra*, 323 U.S. at 537; *Organization for A Better Austin v. Keefe*, *supra*, 402 U.S. at 419. It is for that reason that the First Amendment protects “exaggeration [and] . . . vilification.” *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), quoted with approval in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 271.

This case, then, fits within already established principles. The record shows that appellant Branch circulated a rhetorical, emotive expression of its views about a fact which was admittedly true: appellees were not union members. The Constitution, this Court has held, forbids any state action

inhibiting the dissemination of truthful statements in public controversies. See *Pickering v. Board of Education*, 391 U.S. 563, 574-575 (1968). Accordingly, policy, reason, and a proper respect for the doctrine of *stare decisis* dictate reversal of the judgment below.²²

B. The very statements in issue have been held protected under national labor policy

Even if the First Amendment considerations to which we have referred did not dictate reversal for failure to grant appellants' motions to dismiss, federal labor law does.²³ For the National Labor Relations Board has held that dissemination of the very Jack London definition of "scab" which is in issue here is "permissible." *Cambria Clay Prods. Co.*,

²² Since this Court's review of the record will establish that the publication at issue is protected against state court damage suits by federal labor law and the First and Fourteenth Amendments, to further entertain the Motions for Judgment would be inconsistent with this Court's opinion in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 285:

"This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser v. Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' "

Accord, *Greenbelt Pub. Assn v. Bresler*, *supra*, 398 U.S. at 10, 11; *Pickering supra*, 391 U.S. at 574-575. Cf. *Vaca v. Sipes*, 386 U.S. 171, 193, 198 (1967).

²³ See note 7, *supra*.

106 NLRB 267, 273 (1953), citing *H. N. Thayer Co.*, 99 NLRB 1122 (1951), *enforced in part and remanded in part on other grounds*, 215 F.2d 48 (6th Cir. 1959). It has also held that, in the absence of threatened violence,²⁴ even hurling profane invective at "scabs" does not deprive strikers of the Act's protection. *E.g.*, *Schott Metal Prods. Co.*, 128 NLRB 415 (1960) ("scabbing sons of bitches"); *Terry Coach Industries, Inc.*, 166 NLRB 560, 562 (1967) ("bastard").

In *Linn*, this Court recognized and relied upon the Board's view that pejorative speech, including the epithet "scab," in strikes and organizing efforts is a form of concerted activity protected by the Act. See 383 U.S. at 60-61. Since *Linn* proceeds on the unchallengeable assumption that state courts may not make actionable what federal law protects, see, *e.g.*, *Hill v. Florida*, 325 U.S. 538, 542-544 (1945); *Teamsters Union v. Oliver*, 358 U.S. 283, 296 (1959); *Teamsters Union v. Morton*, 377 U.S. 252, 256-257 (1964), no judgment for appellees based on the Branch publication at issue here could be sustained. Accordingly, for this reason also, the judgment below should be reversed on the ground that appellants' motions to dismiss should have been granted.

²⁴ Of course, use of the word "scab" in circumstances likely to provoke immediate violence is not protected by the Act. In *Youngdahl v. Rainfair*, 355 U.S. 131 (1957), upon findings that mass picketing marked by threats of violence and name calling in unison (including cries of "scab") was calculated to provide immediate violence and was *likely to do so* unless promptly restrained, this Court sustained an injunction against the name calling.

As we demonstrate below, *infra*, pp. 37-38, the Virginia courts did not predicate these damage actions on any threat or provocation of immediate violence, and there was no evidence that distribution of the Branch's newsletter was calculated or likely to cause or did cause any violence at any time.

III. THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE

Gooding v. Wilson, 405 U.S. 518 (1972), establishes the unconstitutional overbreadth of the Virginia statute upon which the judgment below was rendered. The Virginia statute makes actionable "all [written or spoken] words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace" The Georgia statute struck down in *Gooding* provided that "any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." 405 U.S. at 519.²⁵ The similarity between the statute involved in *Gooding* and the one at issue here is fatal to the latter's constitutionality. Words which "are construed as insults and tend to violence and breach of the peace" are precisely equivalent to "opprobrious words or abusive language, tending to cause a breach of the peace."²⁶

In *Gooding* this Court held that the Georgia statute "sweeps too broadly" because it was not limited to "fighting words" (405 U.S. at 525) used in circum-

²⁵ The Virginia statute is no less unconstitutional because violators face civil rather than criminal penalties. As this case graphically illustrates (see p. 46 *infra*), "the fear of damage . . . awards may be markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 277. "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Ibid.*

²⁶ Under the Georgia statute, as authoritatively construed, guilt also was measured by common understanding and practice. 405 U.S. at 528.

stances likely to evoke an "immediate violent response" (405 U.S. at 527). To the extent that the two statutes differ on their face, that of Virginia is broader and therefore more deficient. The Georgia statute was held to reach beyond "fighting words" because the term "opprobrious" includes "conveying or intending to convey disgrace," and "abusive" includes "*harsh* insulting language" (405 U.S. at 525, emphasis added). *A fortiori*, mere "insults," which the Virginia statute outlaws, includes more than "words 'which by their very utterance * * * tend to incite an immediate breach of the peace'" (*ibid.*).

Furthermore, the Georgia statute, on its face, prohibited only opprobrious words spoken to or of another "*in his presence.*" It could be argued, therefore, as the appellee and the dissenting Justice did, 405 U.S. at 522-523, 528, that the "opprobrious words and abusive language * * * prohibited are [only] those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, *and in his presence*, naturally tend to provoke resentment, * * * [*i.e.*] 'fighting words.'" (Emphasis added.) No such argument can be advanced for the Virginia statute, however, for it reaches written words, which are not used "in the presence" of the subject, and which are incapable of provoking an immediate violent response against the writer "by the person to whom, individually, the remark is addressed." 405 U.S. at 524.

The fact that a Georgia court had construed "tendency to cause a breach of the peace" to reach "future" assaults led this Court to conclude that the Georgia statute unconstitutionally encompassed "utterances where there was no likelihood that the per-

son addressed would make an *immediate* violent response." 405 U.S. at 528 (emphasis added).²⁷ The defect which came into the Georgia statute by construction inheres in the very terms of the Virginia statute. And that defect has been confirmed by interpretation and application in this case and others in which the statute has been invoked. Thus, in this case, the statute was applied not to words spoken in the presence of appellees, but to words written to others, of which appellees became aware only indirectly (A. 39-40, 43, 48-49). See also, *Elder v. Holland*, 208 Va. 15, 155 S.E. 2d 369 (1967) (repetition at administrative hearing of another's insulting accusation that policeman was a liar held actionable under statute);²⁸ *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 118 S.E. 2d 668 (1961) (letter to editor attacking plaintiff's performance as school superintendent); *Haycox v. Dunn*, 200 Va. 212, 104 S.E. 2d 800 (1958) (newspaper attack on official corruption); *Alexandria Gazette Corp. v. West*, 198 Va. 154, 93 S.E. 2d 274 (1956) (newspaper report of

²⁷ Mr. Chief Justice Burger and Mr. Justice Blackmun dissented on the ground that the statute should be construed as "preventing precisely that type of personal, face-to-face abusive and insulting language likely to provoke a violent retaliation—self-help, as we euphemistically call it—which the *Chaplinsky* case recognized could be validly prohibited." 405 U.S. at 530, 534, 536-537. Neither suggested that in the absence of face-to-face confrontation "abusive and insulting language" could constitutionally be outlawed. Cf. the concurring opinion of Mr. Justice Powell in *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) querying whether, under *Chaplinsky*, "fighting words" addressed to a police officer, "trained to exercise a higher degree of restraint than an ordinary citizen," may constitutionally be prohibited.

²⁸ Compare *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972).

motion to disqualify domestic relations court judge). Consequently, the statute is unconstitutional on its face. *Gooding, supra*; *Terminello v. Chicago*, 337 U.S. 1 (1949); *Cohen v. California*, 403 U.S. 15, 25-26 (1971). Cf. *Edwards v. South Carolina*, 372 U.S. 229, 237 (1962); *Cox v. Louisiana*, 379 U.S. 536, 551-552 (1965); *Coates v. Cincinnati*, 402 U.S. 611 (1971).

Unlike the Georgia courts in *Gooding*, the courts below did not attempt to defend or justify the Virginia statute as a means of vindicating the State's interest in preventing imminent breaches of the peace. Accordingly, they did not attempt to limit the statute by construction to "fighting words" which are likely to provoke an immediate breach of peace by the addressee. Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). (See Instruction No. 4, J.S. 9a-10a). Any such limitation, of course, would have required dismissal of plaintiffs' actions, for there was no evidence that distribution of the newsletter was calculated or likely to cause any violence at any time.

Instead, the court below held that constitutional vagueness and overbreadth objections are avoided by construing the "insulting words" statute as "one for libel or slander," designed to protect "reputation and social relationships," which authorizes recovery for insulting words used on a privileged occasion only on proof of "actual malice" (J.S. 5a; —; cf. A. 18). Upon the premise that "actual malice" in the common law sense defeats the "protect[ion] of the First Amendment," the court held that its construction of the insulting words statute as requiring proof of "actual malice" established that "only those words which are not protected by the First Amendment are

actionable under the statute," and therefore that the objections upheld in *Gooding* "are not applicable in this case." (*Id.*)

The obvious fallacy, of course, is that *New York Times* and its progeny squarely hold, as we have seen, pp. 9, 15-17, *supra*, that common law malice is "constitutionally insufficient" to ground an action against otherwise protected defamation.

We assume, *arguendo*, that the Virginia statute would not be constitutionally overbroad if its application had been unambiguously and unequivocally limited by construction to "purely private libels, totally unrelated to public affairs." *Garrison, supra*, 379 U.S. at 72. But the opinions of the courts below in this case, as well as the result, demonstrate that it is not so limited. Thus, the trial court held that "a qualified privilege attaches to statements and communications made in connection with the various activities of labor unions" (A. 17), but that this privilege exists only "so long as they act without malice and are not actuated by improper motives" (A. 17-18). The trial court instructed the jury that:

"Under the facts and circumstances of these cases, the statements in question were made upon an occasion known in the law as privileged, and the defendants are not liable for making such statements unless the defendants have abused the privilege." (J.S. 9a, first paragraph of Instruction No. 4).

The Supreme Court of Virginia, as we have seen, announced that under the Virginia statute "actual malice" as defined by the trial court, p. 7, *supra*, overcomes the "public interest in free expression and communication of ideas" (J.S. 5a).

That the Virginia statute is not limited to what its courts consider purely private libels is further confirmed by *Sanders v. Harris*, 213 Va. 369, 192 S.E.2d 754 (1973), decided the same day as the instant case, and cited herein by the court below in support of its holding that under the Virginia statute "actual malice" outweighs "the public interest in free expression and communication of ideas." In *Sanders* the court considered a defamatory communication and publication which accused an English professor of refusing to turn over departmental files to the head of the department. It found that "the events and happenings at Western Community College were matters of public or general concern" and that the *New York Times* rule applied. It apparently held, nevertheless, that plaintiff would be entitled to recover if she proved "actual malice" in the sense of hostility, rather than in the *New York Times* sense, and dismissed the case only upon finding:

"There is no evidence in this case from which the jury could conclude that the statements made by Harris to Chamberlain and the articles published by the Times-World *were made with actual malice* or that they were made with reckless disregard of whether or not they were true." 192 S.E.2d at 757-758 (emphasis added).

In support of its approach, which allows recovery on proof of either "actual malice" or reckless falsity (cf. *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 9-10), the court cited, both in *Sanders* and in the instant case, *Story v. Newspapers*, 202 Va. 588, 591, 118 S.E.2d 668, 670 (1961), where the Virginia insulting words statute, construed as requiring proof of common law "malice," was applied to newspaper criticism of a person "in a public capacity."

Inasmuch as the Virginia statute, as construed, is susceptible of application to defamation concerning public officials and matters of public or general interest, it is unconstitutionally overbroad, even assuming *arguendo*, as the court opined in another context, that the issue in this case, "whether or not [plaintiffs] joined the union," is not an issue of public or general concern (J.S. 8a). For, as *Gooding* demonstrates, a statute capable of application to constitutionally protected speech cannot be sustained even in application to clearly unprotected speech (405 U.S. at 520-521), in that case, the unprovoked use of "fighting words" face to face. 405 U.S. at 520, n. 1, last par. Since the Virginia statute, like that in *Gooding*, "seek[s] to regulate 'only spoken [and written] words,'" as distinguished from conduct, it is governed by the same overbreadth rule. *Broadrick v. Oklahoma*, 41 U.S. L.W. 5111, 5114 (1973).

If, on the other hand, the Virginia courts had limited the statute as construed to purely private libels, but included defamation arising out of labor disputes generally, or out of disputes over unionization particularly, on the theory that such disputes are not a matter of "public or general concern," the statute would fare no better. For, as we have seen, pp. 9, 15-17, *supra*, *Linn* and the First Amendment both protect defamation arising out of such disputes against assertion of state jurisdiction based on common law "malice."

Moreover, if Virginia had attempted to single out and treat as "only a private matter" for the purpose of its insulting words statute the issue of workers' refusal to join the union, on the theory that under the state right-to-work law workers have a "right" not to join, the vice of overbreadth would have been com-

pounded by discrimination. The state would then be forbidding speech and publication designed to induce nonmembers to join "because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). That, as *Mosley* holds, is forbidden by the First Amendment and by the Equal Protection Clause of the Fourteenth. See also, *Schacht v. United States*, 398 U.S. 58, 62-63 (1970).

In addition to being overbroad, the statute as here construed is void for vagueness. The statute does not define the "insults" which it renders actionable, but refers instead to "usual construction and common acceptance," and to "tendency to violence and breach of the peace." So referenced, "insult" is no less subject to varying individual definition than "annoy," which in *Coates v. City of Cincinnati*, 402 U.S. 611, 612-614 (1971), this Court held specifies "no standard of conduct at all."

While the jury was instructed (J.S. 9a) that the statements complained of were to be considered "defamatory and libelous" if they are commonly construed as "insults and tend to violence and breach of the peace," it was also told that:

"mere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more, does not amount to defamation. A *certain* amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law." (Emphasis added.) (J.S. 10a).

This construction and application of the statute, upheld by the court below, leaves at large not only the

question of what language is "insulting," but also *what* "amount of vulgar name calling, indicating hostility or ill will," under the circumstances of this case, is tolerated by Virginia law. As to this, the jury was left free to speculate and to predicate its conclusion on its own prejudices and notions of social policy. Given this latitude, no speaker or writer can predict what language may subject him to liability under the insulting words statute. Since this statute operates directly in the area of First Amendment freedoms, it is unconstitutionally vague. *Coates v. Cincinnati, supra*; *NAACP v. Button*, 371 U.S. 415, 432-433, 437-438 (1963). Cf. *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 11 (1970).²⁹

IV. THE DAMAGE AWARD WAS EXCESSIVE

In *Linn v. Plant Guard Workers*, this court unequivocally stated that in defamation suits arising out of labor disputes, "if the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial." *Linn, supra*, 383 U.S. at 65-66 (emphasis added). Appellants moved for a new trial and a remittitur in the trial court (A. 69-70). The motions were denied and appellants urged below that that denial was error.

In passing upon appellants' contention that the damage award was excessive, the court below seems deliberately to have ignored this Court's command in *Linn* that excessive damages in labor dispute defamation

²⁹ At least five other states penalize insulting words or make them actionable by statute. Ala. Code Tit. 14 § 11 (1959); Ky. Rev. Stat. Ann. § 437-020 (1969); Code of W. Va. § 55-7-2 (1946); Louisiana Rev. Stat. Ann. §§ 14:103, 14:103.1 (1972 Supp.); 1942 Miss. Code Ann. § 1059 (1957). None of the statutes define the term "insulting."

cases be remitted. For, in its opinion, the court below quoted a portion of this Court's discussion of the damage problem at pp. 65-66 of the *Linn* opinion. The quotation included this Court's itemization of the injuries for which recovery could be awarded *but deleted the sentence quoted above relating to excessive damages*. See J.S. 11a. Ignoring the teaching of that sentence along with the text, the lower court contented itself with a statement that "there is no fixed standard for measuring exemplary or punitive damages and the amount of the award is largely a matter of discretion with the jury," citing for that assertion a *pre-Linn* Virginia case which was affirmed by this Court without discussion of the amount of the damage award.³⁰

Had the court below followed *Linn* it would surely have reduced the judgments to nominal amounts, or, in any event, to levels much lower than those awarded by the jury. For appellees offered no evidence that they suffered any injury whatever from Branch's choice of words other than appellees' self-serving testimony that "they were upset" by Branch's publication. The only other evidence of injury was to the effect that co-workers and others who sympathized with the union treated appellees coolly or with hostility after the publication, something one would expect of union members and their supporters upon learning that appellees had refused to join, regardless of the language used to

³⁰ *United Construction Workers v. Laburnum*, 194 Va. 872, 895, 75 S.E. 2d 694, 709, *affirmed*, 347 U.S. 656 (1954). The case involved the successful use of threatened violence to force the plaintiff off a lucrative construction project because plaintiff was non-union.

convey that information.³¹ When this Court opened the door to state defamation suits in *Linn*, it could not possibly have intended to authorize state courts to permit recovery for the foreseeable reaction of one party's sympathizers to facts, accurately communicated, which they had a lawful—indeed a Constitutional—right to receive and act upon. *Thomas v. Collins, supra*, 323 U.S. at 523-524. Hence, the jury could only award damages for appellees' hurt feelings upon learning that the Branch had adopted London's definition of "scab." Such injuries, we submit, cannot possibly support more than nominal damages under *Linn*.

But assuming that appellees' evidence of damage—none of which was pecuniary—was sufficient to support more than a nominal award, it was surely insufficient to support the astronomical "compensatory" and punitive damages which the court below sustained. In determining what damage awards are excessive in this field, it is well to note that at common law the "injuries" which appellees suffered were not compensable at all.

"There is no occasion for the law to intervene in every case where a flood of billingsgate is loosed in an argument over a back fence. The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language, and to acts that are definitely inconsiderate and unkind. There is still, in this country at least, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to his feelings; and in the interest not only of freedom of speech but also of avoidance of other more

³¹ Two appellees got headaches, assertedly from the tension created by the Union members' aversion.

dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam.

"There is the further, and still more significant, evident and serious danger of fictitious claims and vexatious suits in such cases. Petty insult or indignity lacks, from its very nature, any convincing assurance that the asserted mental distress is genuine, or that if genuine is serious and reasonable. When a citizen who has been called a son of a bitch testifies that the epithet had destroyed his slumber, ruined his digestion, wrecked his nervous system, and permanently impaired his health, other citizens who on occasion have been called the same thing without catastrophic harm may have legitimate doubts that he was really so upset, or that if he were his sufferings could possibly be so reasonable and justified under the circumstances as to be entitled to compensation." Prosser, *Torts*, 46-47 (3d Ed. 1964).

Yet if the judgments are permitted to stand, and even more so, if other employees named in the same publication could recover equivalent amounts,³² a major national union will have been financially weakened because of what one rather small branch printed in a local newsletter which was mailed to some 400-odd members. The total jury award, \$165,000, was almost seven times the total yearly revenues of appellant Branch and over twenty-three times the annual dues paid by Branch members to appellant NALC.³³ Those

³² See note 5, *supra*.

³³ The Branch's total revenues in the year 1971 were \$22,952.00. 1971 Annual Report of Old Dominion Branch No. 496, National Association of Letter Carriers, Form LM-3, on file with the United States Department of Labor. Evidence presented at trial apprised

damages provide a startling contrast to the \$500 maximum fine provided by Virginia's criminal abusive language and libel and slander laws. Va. Code Ann. § 18.1-255 (1960); *id.* § 18.1-256 (1973 Supp.). Plainly the award reflects "community hostility to [the] defendant[s] or to an ideology . . . [they] represent, rather than a dispassionate appraisal of besmirched reputation."³⁴

Since the courts below shirked their obligation to review the damage awards and reduce them if excessive, this Court should reverse these judgments with instructions to remit the damage awards to nominal amounts. Alternatively, given the intangible character of appellees' "injury," we submit, any damages above the maximum fine which the State would impose for criminal libel would be "excessive" within the meaning of *Linn*. Cf. *Wozniak v. Local 1111, United Electrical Workers*, 83 LRRM 2575 (Wis. Sup. Ct. 1973).

the courts below of the approximate revenue of the Branch. See A. 36, 75. NALC's annual per capita dues for active (i.e., non-retired) members in 1971 were \$16 (A. 75). Since there are 400 to 420 active members in Branch 496 (A. 36), the total revenue received from them by NALC is between \$6,400 and \$6,720 per annum.

³⁴ Currier, *Defamation in Labor Disputes: Preemption and The New Federal Common Law*, 53 Va. L. Rev. 1 (1967). Compare *Wozniak v. Local 1111, United Electrical Workers*, 83 LRRM 2575 (Wis. Sup. Ct. 1973) where the court reduced the jury verdict of \$5,000 compensatory and \$20,000 punitive damages for calling plaintiff a "scab" to \$1,000, in reliance, *inter alia*, on the \$1,000 maximum fine provided in the Wisconsin Criminal Code for Criminal Defamation.

The opinion in *Wozniak* does not indicate that defendants relied upon *Linn* or asserted any First Amendment rights.

CONCLUSION

For the reasons stated above, the Virginia insulting words statute should be held unconstitutional, the publication at issue should be held protected by national labor policy and the First and Fourteenth Amendments, and the decision and judgments below should be reversed.

Respectfully submitted,

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August 1, 1973

SUPPLEMENTAL APPENDIX

[1]

VIRGINIA:

IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

HENRY M. AUSTIN

L. D. BROWN

ROY P. ZIEGENGEIST

-VS-

OLD DOMINION BRANCH # 496

**NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO,
An Unincorporated Association,**

and

THE NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO

TRANSCRIPT of the evidence and other incidents of the above when heard on *July 1 and 2, 1971*, Before Honorable A. Christian Compton, Judge, and a jury.

[123] ROY P. ZIEGENGEIST, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

Direct Examination

By Mr. Kapral:

• • •

[128] Q. Tell the gentlemen of the jury exactly why you have chosen, after 12 years of employment in the United States Postal Service, not to become affiliated with the Union.

MR. RATNER: I object. The witness just answered the question.

THE COURT: You are not asking the witness to repeat what he just said, are you?

MR. KAPRAL: No.

THE COURT: Do you want to elaborate on the reason, Mr. Ziegengeist?

A. Yes, sir. It is my opinion, like I said, that I owe the Federal Government eight hours work for eight hours pay. It is my opinion that the Union, when they negotiate with Management they negotiate for mainly the things that will help the employee and I realize I am talking about myself, but I feel like the situation as exists in the United States Post Office I felt more things should be done to negotiate for the patron, to improve the service. Therefore I felt I just couldn't go along with the [129] beliefs of the Union and in the same respect I give the same respect to a Union member if he has his strong feeling why he wants to belong, and that is his business. I felt as long as I did my job to the best of my ability I have no guilty feelings about not being a Union member.

• • •

[145] L. D. BROWN, a plaintiff herein, called in his own behalf, first being duly sworn, testified as follows:

Direct Examination

By Mr. Cherry:

Q. Mr. Brown, will you state your name and place of residence.

A. Leslie D. Brown, 3300 Edgewood Avenue, Richmond, Virginia.

Q. How long have you worked for the United States Government in the Postal Service?

A. I have worked for the Post Office for 13 years.

Q. 13 years. Have you ever been a member of the Postal Union here?

A. Yes, at one time I was a member of the Union.

Q. And did you get out of the Union?

A. I got out of the Union.

Q. Any particular reason?

A. Yes, the reason for getting out I didn't like the way the Union was running. I didn't like the way they disbursed with the money was one reason I got out. [146] They would have big conventions and send so many delegates to Hawaii and elsewhere and I didn't like the way the money was disbursed and I got out. Another reason I got out was because of the dues increase. The dues doubled and I stated that I wanted to get out.

Supreme Court of the United States

October Term, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Appellants,

v.

HENRY M. AUSTIN, L. D. BROWN, AND ROY P. ZIEGENGEIST,
Appellees.

ON APPEAL FROM A JUDGEMENT OF THE SUPREME COURT
OF VIRGINIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the appellants' position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women.

Organizing the unorganized is the lifeblood of the trade union movement. And, as this Court has recognized:

“representation campaigns are frequently characterized by bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.” *Linn v. Plant Guard Workers*, 383 U.S. 53, 58.

The instant case involves a defamation judgment of \$165,000¹ in favor of three individuals, who proved no pecuniary losses and little, if any, intangible harm, assessed because a local union, during an organizing effort, accurately characterized those individuals as “scabs” in the local’s newsletter, and embellished that characterization with an uncomplimentary description of “what a scab is,” attributed to Jack London. J.S. 1a-4a. Since organizing campaigns “are ordinarily heated affairs” and the use of “epithets such as ‘scab’ . . . are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7 [of the NLRA]” (*Linn*, 383 U.S. at 58, 61-62), this enormous, and so far as we are aware unprecedented, judgment obviously undermines the “principle that debate . . . should be uninhibited, robust, and wide open,” which this Court has stated “weigh[s] heavily” in the present context (*id.* at 62-63). It is for this

¹ A sum equal to approximately seven times the total annual revenue of the local union which published the alleged defamation and over twenty-three times the annual dues paid by the local’s members to the national union also sued. J.S. 21-22.

reason that the AFL-CIO wishes to present its views to the Court.

ARGUMENT

THE DEFAMATION JUDGMENT AGAINST THE DEFENDANT UNIONS MAY NOT STAND SINCE THE STATEMENTS UPON WHICH IT IS BASED ARE NOT ACTIONABLE UNDER THE GOVERNING FEDERAL STANDARD ENUNCIATED IN *LINN V. PLANT GUARD WORKERS*, 383 U.S. 53.

1. (a) In support of an effort to organize non-members of the bargaining unit of which it was the majority representative, Old Dominion Branch No. 496 of the National Association of Letter Carriers, AFL-CIO, published the non-members' names under the heading "List of Scabs" in the Branch's monthly newsletter. And in the June, 1970, issue, the newsletter also carried the colorful rhetoric, attributed to Jack London, describing a scab, *inter alia*, as a "two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue." The newsletter was sent to the Branch's members and posted on a bulletin board at a post office station (there is no evidence that anyone other than a letter carrier saw it there). J.S. 1a-3a. Three of the non-members whose names were listed sued the Unions in the state courts under Virginia's insulting words statute, Virginia Code § 8-630. After proceedings in which the Unions preserved their federal defenses, including those based on federal labor law, and in which the plaintiffs proved no pecuniary losses and made only the most minimal showing of less tangible injury (such as mental suffering), the Supreme Court of Virginia affirmed

a judgment of \$10,000 compensatory damages and \$45,000 punitive damages for each plaintiff. J.S. 1a, 3a-4a, 6a-8a, 11a.

(b) In *Linn v. Plant Guard Workers*, 383 U.S. 53, this Court announced three propositions of the federal law governing state actions for defamation growing out of a union campaign to organize workers as to which the protections of § 7 of the National Labor Relations Act apply.² First, that the exclusive primary jurisdiction principle of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, does not oust the state courts' jurisdiction to entertain such suits. *Linn*, 383 U.S. at 59-61. Second, that, since federal law establishes that "epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in [organizational] struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute" (*id.* at 60-61), the substantive law the states may apply in exercising that jurisdiction is "limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false" (*id.* at 61).³ Third, the Court

² In the instant case the source of the federal right to organize was not § 7 of the NLRA, but a parallel provision—§ 1 of Executive Order 11491 (J.S. 12a-13a). The court below recognized that the Executive Order "is essentially equivalent in both content and purpose to the National Labor Relations Act, * * * and 'is to be accorded the force and effect given the statute enacted by Congress.' *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (C.A.5), *cert. den.* 389 U.S. 977." J.S. 6a & n. 1.

³ While less frequently utilized to vindicate paramount federal labor policy than the *Garmon* rule, this Court's decisions also establish the principle (relied upon in the portion of *Linn* noted above) that where the state courts do have jurisdiction, they may

prescribed certain rules for measuring damages where the plaintiff has met this standard for proving liability. *Id.* at 65-66 (see also n. 4 *infra*).

The court below acknowledged the controlling authority of *Linn* for the instant case insofar as that decision is protective of state jurisdiction. Its holding that federal law "has not preempted the state court from exercising jurisdiction in these cases" is squarely and properly based on *Linn*. J.S. 6a-7a. And its determination as to whether the damages awarded were excessive is centered on a lengthy (albeit highly selective)⁴ quotation from *Linn* which the state court read as "set[ting] out the items of damages that may be considered by a jury." J.S. 11a.⁵

not apply state substantive law to "forbid the exercise of rights explicitly protected by § 7" without contravening the Supremacy Clause. *Bus Employees v. Missouri*, 374 U.S. 74, 82; see also e.g. *Hill v. Florida*, 325 U.S. 538; *Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62; *Teamsters Union v. Oliver*, 358 U.S. 283; *Nash v. Florida Industrial Commission*, 389 U.S. 235.

⁴ The court below began its quotation with the portion of the *Linn* opinion immediately following this Court's statement: "[E]ven in those jurisdictions * * * where certain language characteristics of labor disputes may be held actionable per se * * * the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. This is a salutary principle." 383 U.S. at 65. And within the quotation the three asterisks elided the sentences: "The fact that courts are generally not in close contact with the pressures of labor disputes makes it especially necessary that [the] rule [requiring proof of severe harm] be followed. If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." *Id.* at 65-66.

⁵ The judgments entered below are, all else aside, grossly disproportionate to the plaintiffs injury and mulct the defendants for

But the state courts refused to follow *Linn* insofar as that decision limited the scope of the Virginia substantive law of libel. In face of this Court's holding that in cases such as this:

"The standards enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), are adopted by analogy * * * to permit recovery of damages in a state cause of action *only* for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false [in order to] guard against abuse of [the] libel action, and [the] unwarranted intrusion upon free discussion envisioned by [federal law]" (*Linn*, 383 U.S. at 65; emphasis supplied)

the court below held:

"that *New York Times* * * * [is] not applicable in the cases at bar * * * [and] that the federal rule as to * * * [the] knowing-or-reckless-falsity standard enunciated in *New York Times* is not applicable in these cases" (J.S. 8a, 10a-11a).

This error alone entitles appellants to a new trial at the very least.

(c) Moreover, the statements published in the Branch's newsletter are not actionable at all under the *Linn* standard. Concededly, at the time their names were listed, the individuals named were nonmembers. And a "scab" is "one who refuses to join a union." Webster's Unabridged New Twentieth Century Dictionary, Second Edition,

"punitive" damages which total over 200 times the maximum fine which may be assessed on conviction of the parallel statutes which declare abusive language and libel and slander to be crimes. See Virginia Code §§ 18.1-255 & 18.1-256.

p. 1614. Thus, this case involves the accurate use of an epithet and not "defamatory statements published with knowledge of their falsity" (*Linn*, 383 U.S. at 65). Moreover the definition of "scab" printed in the Branch's newsletter (J.S. 2a-3a) was "no more than rhetorical hyperbole"; and, thus, under the *New York Times* standards adopted in *Linn*, provides no basis for the judgment rendered. *Greenbelt Cooperative Publ. Assn. v. Bresler*, 398 U.S. 6, 14; see also *Cafeteria Workers v. Angelos*, 320 U.S. 293. Indeed, the NLRB, the agency whose experience provided the background for the rule stated in *Linn*, 383 U.S. at 59-61, has held the use of the term "scab," as here defined, to be permitted by statute even if used "erroneously," (*id.* at 60-61; see e.g., *Cambria Clay Prods. Co.*, 106 NLRB 267, 273 enforced in part and remanded in part on other grounds 215 F.2d 48 (C.A. 6).⁶ This being so appellants' motion to dismiss should have been granted.

(d) In *Linn* the Court voiced cautious optimism that the limited inroads there made on "state libel remedies" would be sufficient to vindicate the "national labor policy," which is protective of "vehement, caustic, and sometimes unpleasantly sharp attacks . . . provided [they] fall short of a deliberate or reckless untruth;" but noted that it would

⁶Since the alleged defamation here was published in a newsletter, even assuming *arguendo* that the term "scab" as defined in that publication could be considered a "fighting" word, the judgment below cannot be supported on the basis of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572; for that case only sanctions state power to redress "face to face words" which "tend to invite an immediate breach of the peace" (*id.* at 572-753). See *Gooding v. Wilson*, 405 U.S. 518, 521-523.

reconsider its holding that the states' jurisdiction is not entirely preempted "if experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy." 383 U.S. at 67, 62-63.

We do not urge such reconsideration now. The Court evidently intended such a step to come after the substantive rule of *Linn*—that the *New York Times* standards are applicable in defamation suits growing out of union organizing efforts covered by federal law—had been given the opportunity to operate. But this presupposes, and surely this Court anticipated, that the state courts would respect the *Linn* rule. The court below having failed to do so, reversal on the basis of *Linn* is necessary to vindicate the authority of this Court's precedents.

2. Of course, given the specific holding in *Linn* already discussed, no First Amendment issues need be reached. But the Virginia Supreme Court's statement that the publication here dealt with "only a private matter" (J.S. 8a), and that the First Amendment does not attach is so serious a departure from the decisions of this Court going back 30 years, that it cannot be met with silence. As early as *Senn v. Tile Layers Union*, 301 U.S. 468, 478, Mr. Justice Brandeis held for the Court that:

" * * * Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution * * *."

And in light of the asserted injury to appellees here, it is noteworthy that the very fact publicized in that case was that Senn was not a member of a labor union, that the

union's objective was "to induce him to refrain from exercising" his right not to join a union (*id.* at 77-78), and that the Court recognized "that disclosure of the facts of the labor dispute may be annoying to Senn * * *." *Senn* was followed by *Thornhill v. Alabama*, 310 U.S. 88, 102 which expressly held that:

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

Whatever inroads subsequent decisions may have made on *Thornhill* in its broadest sweep, that core holding remains the law. See e.g. *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284, 294-295; *Teamsters v. Newell*, 356 U.S. 341. Moreover, this Court's decisions applying *New York Times* do not rest on a limited reading of the scope of the First Amendment. In *Time Inc. v. Hill*, 385 U.S. 374, 388, decided after *Linn*, this Court held:

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."

Significantly, the Court quoted and relied on *Thornhill*, 385 U.S. at 388. The *Time Inc.* statement of the scope of the

First Amendment is an echo of what was said in *Thomas v. Collins*, 323 U.S. 516, 531, where the purpose of the speech and the meeting involved was to urge working men to join a union:

"Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

CONCLUSION

For the reasons set out above, as well as those stated in appellants' brief, the decision below should be reversed.

Respectfully submitted,

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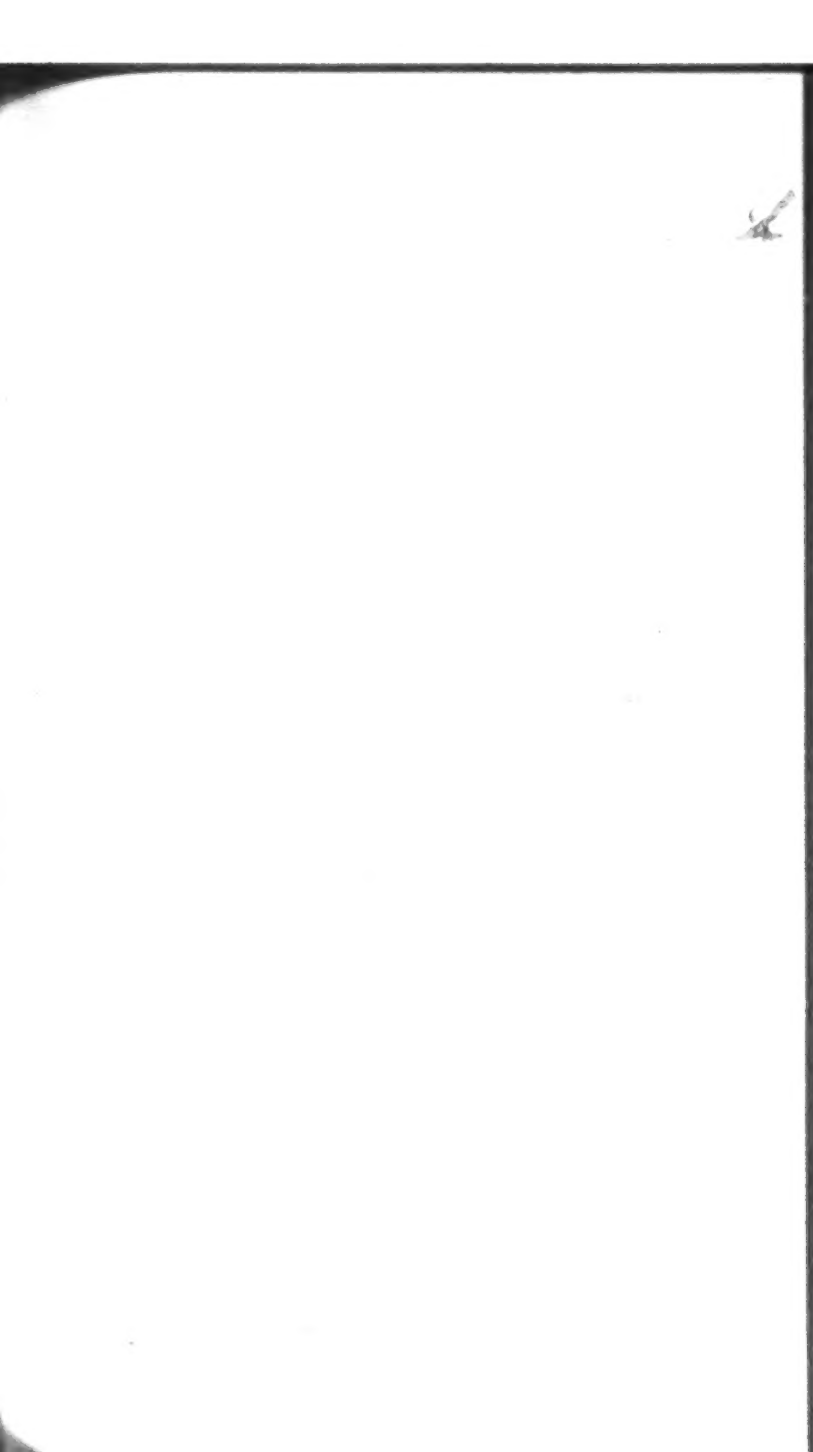
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August, 1973



INDEX
TABLE OF CONTENTS

	Page
JURISDICTION	2
STATUTE AND EXECUTIVE ORDER INVOLVED....	2
QUESTIONS PRESENTED.....	2
STATEMENT	2
A. The Facts	2-7
B. The Proceedings in the Trial Court	7
C. The Decision Below	7
INTRODUCTION AND SUMMARY OF ARGUMENT ..	7-11
ARGUMENT	11
I. Appellants Assert The Court Below Erred In Holding <i>New York Times</i> Inapplicable	11-17
A. Appellants assert the court below misread <i>Linn</i>	11-17
B. Appellants assert the court below erred in holding the First Amendment inapplicable ..	17-20
II. Appellants Assert The Publication In Issue Is Pro- tected Against State Court Damage Suits By The First Amendment And National Labor Law	20-25
A. Appellants assert since appellees alleged no facts showing defamatory falsehood, <i>New</i> <i>York Times</i> protects the publication	20-23

	Page
B. Appellants assert the very statements in issue have been held protected under national labor policy	23-25
III. Appellants Assert The Statute Is Unconstitutionally Overbroad And Vague	25-29
IV. Appellants Assert The Damage Award Was Excessive	
CONCLUSION	29-32

TABLE OF CITATIONS

Cases:

Automobile Workers, v. Russell, 356 U. S. 634	32
Broadrick v. Oklahoma; 41 U.S.L.W. 5111 (1973)	27
Brooks v. Calloway; 12 Leigh (39 Va.) 466	26
Cafeteria Union v. Angelos, 320 U.S. 293, 295 (1943) . . .	11
Cambria Clay Products Co. 106 N.L.R.B. 267 (1953)	23
Cantwell v. Conn. 310 U.S. 296 (1940)	18
Carpenter v. Meredith, 122 Va. 446	15
Carwile v. Richmond Newspapers, Inc., 196 Va. 1 (1954)	
	82 S.E. 2nd 588,591 .21
	25, 28,29
Chaplinsky v. New Hampshire 315 U.S. 568 (1942)	18
Coates v. Cincinnati; 402 U.S. 611	27
Cook v. Patterson Drug Co. 185 Va. 516	26
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) . 10, 15,17	
Darnell v. Davis, 190 Va. 701, 58 S.E. (2d) 68	28

Table Of Contents Continued

iii

	Page
Gooding v. Wilson, 405 U.S. 518 (1972)	25
Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6 (1970) . . .	14, 16
Guide Pub. Co. v. Futrell, 175 Va. 77, 7 S.E. (2d) 133 . . .	28
H.N. Thayer Co; 92 N.L.R.B. 1122	23
International Assoc. of Machinists v. Gonzales, 356 U.S. 617 (1958) . . .	25
James v. Powell 154 Va. 96	15, 21, 29
Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 86 Sp. Ct. 667. . .	2, 9, 25, 26, 30
Moss v. Harwood, 102 Va. 386, 46 S.E. 385	29
M. Rosenbert & Sonsv. Craft, 182 Va. 512; 528 29 S.E. (1944) (2nd) 375, 382-8325	29
New York Times v. Sullivan, 376 U.S. 254 (1964) 84 Sp.Ct. 710.	10, 12, 13, 15, 26
R.H. Bouligny, Inc. v. United Steelworkers 383 U.S. 145; 154 S.E. 2nd 344, 356	14, 15
Rosenblatt v. Baer; 383 U.S. 75 (1966)	15, 26
Rosenbloom v. Metromedia Inc., 403 U.S. 29. . .	10, 18, 19, 27
Roth v. U.S. 77 Sp.Ct. 1304; 354 U.S. 476 1 L.Ed. 2nd 1498 78 Sp.Ct. 8; 355 U.S. 852	26
SanDiego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	14
Senn v. Tile Layers, 301 U.S. 468 (1967)	19
Shupe v. Rose's Stores, Inc. 213 Va. 374	26, 29
Thornbill v. Alabama, 310 U.S. 88 (1940)	15
United Constr. Workers, v. Laburnum Constr. Corp. 194 Va. 872; 347 U.S. 650	32
Van Lom v. Schneiderman, 210 P. 2d 461	30
Williams Printing Co. v. Saunders 113 Va. 156	15
W.T. Grant Co. v. Owens, 149 Va. 906, 141 S.E. 860 . . .	28

Youngdahl v. Rainfair 355 U.S. 131 (1957)	22
---	----

OTHER CITATIONS:

Code of Va., § 8-630 "Insulting Words"	25, 27, 29
Code of Va., § 40.1-58 to § 40.1-69 "Right to Work Law" .12	
National Labor Relations Act	12, 14
First & Fourteenth Amendments Constitution of U.S.	21
EXECUTIVE Order 11491	6, 7
Va. Code Ann (Criminal Law Section)	20
Black's Law Dictionary (Analogy)	12
Newell on Slander & Libel § 997 pg. 1026	31
Corpus Juris Secundum Vol. 16, 213 (2)	26
Corpus Juris Secundum Vol. 53, § 9, 10, pp. 46, 47	26
Corpus Juris Secundum Vol. 53, § 1	26
Restatement of Torts § 565 & § 599	13, 22

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, *Appellants*,

v.

HENRY M. AUSTIN, L. D. BROWN, and
ROY P. ZIEGENGEIST, *Appellees*.

On Appeal from a Judgment of the Supreme Court
of Virginia

BRIEF FOR THE APPELLEES

HENRY M. AUSTIN, L. D. BROWN, and ROY P.
ZIEGENGEIST, file this brief in opposition to Appeal
by Appellants from Judgment of the Supreme Court of
Virginia.

JURISDICTION

Jurisdiction to review the decision below is as stated in Appellants Brief.

STATUTE AND EXECUTIVE ORDER INVOLVED

This is stated in Appellants Brief.

QUESTIONS PRESENTED

1. Whether *Linn v. Plant Guard Workers*, 383 U. S. 53 (1966), precludes, as a matter of national labor policy, a state court award of defamation damages for a statement published in a local union newspaper which accurately identifies certain employees as "scabs" and defines "scab" in pejorative terms.
2. Whether a damage award based upon the aforesaid publication is barred by the First and Fourteenth Amendments to the Constitution of the United States.
3. Whether a state statute which, as authoritatively construed, makes "insulting words" actionable, without a showing of immediate danger of breach of the peace, if the words are uttered with "actual malice," defined as hostility, is unconstitutionally overbroad and void for vagueness.
4. Whether three separate awards of \$55,000.00 each of compensatory and punitive damages, for publishing the statement in question, is "excessive" within the meaning of *Linn, supra*, 383 U. S. at 65-66.

STATEMENT

A. The Facts

The Appellants brief presents only a limited statement of the facts and Appellees present in addition a more comprehensive statement of what transpired.

The Appellees, Henry M. Austin, L. D. Brown, and Roy P. Ziegenggeist, were postal carriers of the Richmond, Virginia post office. None of the Appellees were members of the Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union"), having elected not to become members. They were not required to join "Union" under Executive Order 11491. The Virginia Right To Work Law also gave them the right to decide whether or not they would join. There were no racial overtones or discrimination of any kind involved in what transpired; both Austin and Brown being black and Ziegenggeist caucasian. On two occasions preceding the libelous publication which is the subject of this action the name of the Appellee, Henry M. Austin, was printed in the Local Branch Newsletter "Carriers Corner" under a list of "Scabs". (A.39) The Appellee, L. D. Brown's name was published once as a "Scab". (A.48) After the second publication of his name, Austin, protested this to the Postmaster of the Richmond Post Office stating that coercion was being used to force him to join the "Union" and that he thought management should be advised that coercion was being used on members of the Richmond Post Office in violation of guarantee of the Federal Government that employees in the post office did not have to join "Union". (A.39) He also talked with the President of the Local Branch of the "Union", and expressed his concern about his name being printed, stating he did not know what a "scab" was but that he would sue the next official of "Union" who called him a "scab" as well as the whole "Union". In response to these complaints made in advance of the libelous article he was informed by the President that this was one of the tools used by "Union" against carriers who had a chance to join "Union" and had not done so and that there was nothing the Postmaster could do about it. He was further informed that the

only way he could stop it would be by joining the "Union". He was further told there was nothing he or the Postmaster could do to stop the printing. (A. 40, 41) Several weeks after this complaint to the "Union" President, the libelous article concerning the Appellees was printed in "Carriers Corner" and posted on at least one bulletin board at one sub-station. This Article is set forth in Appellants Statement of Facts, (p. 4, 5) (A. 72). Underneath the Article the three Appellees were listed by name as "scabs".

"The Scab

Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*.

A scab is a two-legged animal with a cork-screw soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellow-men for an unfulfilled promise from his employer.

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was

a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

List Of Scabs

Henry Austin	Richard Leonard
Lewis Bolton	F. E. Moriconi
E. D. Brown	Judson Proctor
L. D. Brown	Wilford Tevis
R. L. Broughman	Hunter Whitlock
R. L. France	R. L. Worsham
Roger Hanson	R. P. Ziegengest
Randolph Jacobs	

The calling of Appellees "Scabs" is not the subject of the suit for libel but the libelous Articles printed of and concerning them, which held them up to ridicule by their fellow employees and attributed to them, lack of character, rotten principles and of being traitors to God, Country, Family and Class. While "Union" contended the Article was mere hyperbole and that no one would have taken same seriously, yet the President of the Local, Lawrence Hutchins testified he did not know whether the Appellees had rotten principles (A. 34) and the Secretary Angelo Parker, testified that he thought the Appellees principles should be questioned and that he felt they had rotten principles. He further testified that the purpose of the publication concerning Appellees was to let people know what is going on. (A. 37). The President of the Local also testified that the derogatory statements were published so that fellow employees would stop associating with them (A. 57) and to persuade Appellees to join the "Union" (A. 58). Kenneth Fiester, President of the International Labor Press Association, testified that the libelous article had been printed so many times in labor publications over the past 30 years that he could not say how many. Under cross examination, however, he admitted that in the entire 30 years he had never seen

this article appear listing certain persons named as individuals. (A. 53).

Counsel for "Union" stipulated that "Union" had not apologized and had not authorized an apology and did not offer any at the trial. (A. 36). President of "Union" testified that the Article was published as a figure of speech and he could not say whether they were traitors, had rotten principles or any of the characteristics published of them. (A. 34).

Austin had been employed at Richmond Post Office for 14 years and never had any troubles with his fellow employees. Brown and Ziegenggeist had been employed 13 and 12 years respectively and never had problems with their fellow workers until after the libelous publication. Austin testified that after the article was printed the other carriers with whom he previously had good relationships stopped associating or speaking to him and that he has been working in a hostile atmosphere; that on two occasions at social gatherings he was referred to as being the "Scab" they were talking about; that he began to have migraine headaches and had to go to the emergency room at The Medical College of Virginia Clinic and his trouble was diagnosed as tension and nervousness, and he lost quite a lot of time, sometimes as much as 2 or 3 days at a time, from work because of working under hostile atmosphere. (A. 42, 43). Austin's testimony indicated he was a man of strong convictions and of high principles. It was these principles and convictions which persuaded him not to join "Union". Appellee, Ziegenggeist testified that he had enjoyed good relationship with his fellow workers prior to the publication, and that thereafter they became cool to him, his wife was distraught, that he was harrassed by "Union" representatives. His daughter testified that this had been upsetting and they were all scared of what might happen to them. (A. 43, 45, 46, As la, lb). Ziegenggeist was a dedicated employee of high principles who worked on top of the clock, extra time, believing in an honest days work for a days pay. Undoubtedly his reasons for not joining

"Union" stemmed from his high principles in giving the U. S. Government a full days work and his practice of working 15 to 30 minutes a day extra, off the clock for which he was not paid; a practice strongly and vehemently opposed by "Union" who condemned him in the strongest terms for giving extra work to the U. S. Government. Appellee, Brown testified that the libelous publication was posted on a bulletin board at his station and came to his attention; that he had been upset and nervous ever since the libelous article was published, suffered from headaches, and that he had to work in a hostile atmosphere as a result of the article and his associates made jokes and called him different names. (A. 47, 48, 49, As 2a).

Executive Order 11491 specifically provides that each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal to refrain from joining a labor organization. It further provides that the head of the Agency shall assure that no interference, restraint or coercion is practiced within his agency to encourage or discourage membership in a labor organization. (J. S. 12a-33a).

B. The Proceedings In The Trial Court

This is set out in Appellants Brief and in the Appendix.

C. The Decision Below

This is set out in Appellants Brief and in the Opinion of Supreme Court of Virginia.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case the individual judgment awarded each of Appellees totals \$55,000.00, that is \$10,000.00 compensatory and \$45,000.00 punitive damages. The Appellees are three letter carriers and represent only a handful of carriers who had not joined the local "Union".

At the time of publication of the libelous article there was no labor dispute involved as such, no violence, no picketing, no disturbance of any kind. There was nothing involving Appellees publicly or otherwise, and no public interest or concern as to any organizing campaign by "Union". They were three individual letter carriers who had decided as a matter of principal not to join "Union". They had never been involved publicly in any way and there was no publicity of any kind involving their decision not to join "Union". In fact in so far as the public was concerned they were completely unknown. Their names have never, prior to suit, been published in any context relating to their employment. They enjoyed a friendly and cooperative relationship with their fellow employees for a period of 12 to 14 years.

The use of the word "Scab" in reference to the Appellees is not the subject of the suit for libel. "Union" contends that all that was involved was informing Appellees' fellow workers that they were not "Union" members, however, this could have been accomplished by publishing a list of non union members if "Union" so desired. That was not the purpose of the publication, as "Union" had already published Austin's name twice as a "Scab" (non-member) and Brown's name once. Throughout the trial and appeals Appellants contend that the language used was such that no one would have taken same seriously, meaning that Appellants were aware that such statements of Appellees were false but were issued as a figure of speech believing no one would take same seriously.

The defamatory publication, the subject of the libel suit, was made after the Appellee Austin had protested to the Postmaster and to the President of the Local that coercion was being used to compel non "Union" members to join "Union". This was certainly a form of coercion from which it would appear workers were protected by the Executive Order.

The libelous publication was made by "Union"

the foregoing complaint for the admitted purpose of
ing pressure upon Appellees to compel them to join
n", that is to let Appellees fellow workers know what
of persons "Union" considered them to be so that
workers would not associate with them.

The publication which "Union" attributes to Jack
on has been widely circulated in Labor Organizations,
er, according to a "Union" witness it has never in 30
been published with reference to specific individuals
oned by name. The article which "Union" says is
hyperbole attributes to Appellees and conveys to the
that Appellees not only were traitors but men of
ow character and rotten principles that they should
pised by their fellow workers.

It strains the concept of freedom of speech out
proportion to say that such language is and should
ected under the First Amendment. The libel was
ued under any situation of emotional stress by
n" but was coldly, and deliberately issued with
ulated purpose of harming Appellees in their work
induce fellow workers not to associate with them.
ard to conceive of a clearer case of maliciousness
a its publication.

It is the contention of "Union" that all that
lved here is free speech protected under the First
ourteenth Amendments. It being their contention
e law tolerates such language as was used here, in
they term a labor dispute.

This Court in *Linn v. Plant Guard Workers*, 383
3 (1966) dealt at length with the problems arising
bel and slander in a labor dispute and concluded
61:

"In sum although the Board tolerates intemper-
ate, abusive and inaccurate statements made by
the Union during attempts to organize the em-
ployees it does not interpret the act as giving
either party license to injure the other inten-

tionally by circulating defamatory or insulting materials known to be false."

Unless the rights of individual workers as spelled out in *Linn, supra*, are preserved such individuals would be placed at the mercy of Union without any protection under state right to work laws and without any means of redressing defamatory assaults upon their character. Unions while very necessary in the protection of workers can also become mean and vicious in their attitude and actions towards workers who elect not to become members. Unions have become monolithic in size and an individual worker singly is almost helpless to combat any abuses committed by them. A deterrent to abuses by Union is absolutely necessary if the rights of the individual to make his own decision is to be preserved.

The extent to which state libel laws have to yield to the constitutional protection of freedom of speech and the press was first considered in *New York Times v. Sullivan*, 376 U. S. 254, holding that in an action by a public official against a newspaper there can be no recovery unless the defamatory falsehood was made with actual malice - that is with knowledge that it was false or with reckless disregard of whether it was false or not. In *Curtis Publishing Co. v. Butts*, 388 U. S. 130 the rule as to public officials was broadened to include "public figures". In *Rosenbloom v. Metromedia Inc.* 403 U. S. 29, the rule as to "public officials" and "public figures" was broadened to include a private individual where the statement in a radio broadcast concerned an issue of "public or general interest".

The Appellees were not "public officials" not "public figures" and whether or not they joined the "Union" was not a matter of public or general concern. Hence under the *Linn* holding they were entitled to recover upon a showing that the defamatory statements were circulated with malice and caused them damages. As is indicated it is difficult to envision a case where malice was more clearly shown than as here where the defamatory statement was published recklessly in disregard of Appellees rights and

without regard as to whether same were true or not following protest by one of the Appellees and published for the admitted purpose of inducing fellow employees not to associate with non members. Damages were proved by each of the Appellees including alienation of associates (one of the elements specifically mentioned by this Court in *Linn*), injury to reputation, mental stress and suffering and loss of time from work and medical cost.

ARGUMENT

I. APPELLANTS ASSERT THE COURT BELOW ERRED IN HOLDING *NEW YORK TIMES* INAPPLICABLE

A. Appellants Assert The Court Below Misread *Linn*

It is the contention of Appellants that the Court below misread *Linn* and that the decision of the Supreme Court of Virginia is in irreconcilable conflict with *Linn*. Their contention is based upon certain portions of the *Linn* opinion citing *Cafeteria Union v. Angelos*, 320 U. S. 293, 295 (1943) in which it is stated that labor disputes being heated affairs where charges, counter charges, unfounded rumors, vituperations, personal accusations, etc., are common place. The Court noted in *Linn* at page 58 that it is necessary to determine whether libel actions in such circumstances might interfere with the National Labor policy, and at page 61 observed that while a certain amount of intemperate and abusive statements are tolerated it does not interpret the National Labor Relations Act as giving either party a license to injure the other intentionally. At page 63 it is observed that malicious utterance of defamatory statements in any form cannot be condoned, and Unions should adopt procedures calculated to prevent such abuses. It is pointed out that the National Labor Relations Board can award no damages, impose no penalty, nor give any other relief to the defamed individual, while state remedies have been designed to compensate the victim and enable him to vindicate

his reputation.

The decision in *Linn* contrary to Appellants assertions observes that free speech in a labor organizing campaign does not permit the unprovoked infliction of personal injuries and that damages for personal injuries may be assessed without regard to the merits of the labor controversy. The Court then to minimize the consequences so that legitimate state interest would not interfere with the National Labor Policy at pg. 64 limited the availability of state remedies in the following language:

"We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Linn v. Plant Guard Workers*, 383 U. S. 53, at 64.

The Court then goes on to say that the standards enunciated in *New York Times Co. v. Sullivan* 376 U. S. 254 (1964) are adopted by analogy rather than by constitutional compulsion. According to Blacks Law Dictionary "Analogy" does not mean identity but implies a difference or the similitude or relations which exist between things compared, such as recourse to cases on a different subject matter, but governed by the same general principle. The Malice test in *Linn* pg. 65 was applied to effectuate the statutory design with respect to pre-emption.

That the Supreme Court of Virginia in the decision below correctly interpreted *Linn* is apparent from the dissenting opinion of Mr. Justice Fortas with whom the Chief Justice and Mr. Justice Douglas join. The dissenting opinion states that the holding of the majority in *Linn*, pg. 70, is as follows:

"* * * the Court today holds that Petitioner perceiving himself the target of purportedly false and defamatory statements may sue Union and several of its officers for damages - - so long as he pleads that the statement is defama-

tory, was made with malice and caused some injury to him. Should he succeed in clearing the hurdles set in his path, he may recover not only compensation for his "injuries" but punitive or exemplary damages as well."

The dissent at page 70 comments that the malice which the Court defines as a deliberate intention to falsify or a malevolent desire to injure is, after all, a largely subjective standard. The dissent further comments (pg. 71-72) that the Court in this case has changed prior decisions by allowing the states to protect a persons reputation from words uttered in a labor dispute.

As was previously noted in the majority holding in *Linn* the state remedies for libel in labor disputes were available where complainant could show the defamatory statements were circulated with malice and caused him harm. There is no constitutional requirement as to the standards enunciated in *New York Times v. Sullivan*, 376 U. S. 254 (p. 65). The *New York Times* standards adopted by analogy are applied to effectuate the statutory design with respect to pre-emption. The decision in *Linn* (pg. 67) concludes with this sentence:

"We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act."

It follows as was concluded by the Supreme Court of Virginia that state remedies were to be applied. The proceedings in the state court was conducted under the state procedures, the Appellants were given a qualified privilege and the jury was told that there could be no recovery unless actual malice were proved, which was defined in accord with the Virginia procedures.

In "Restatement of Torts" § 599: "One who publishes false and defamatory matter of another upon a conditionally privileged occasion is liable to the other if he abuses the occasion."

Under this section of the restatement of torts, abuse

of this privilege is defined among other things as publishing matter for some purpose other than that for which the particular privilege is given. Here the "Union" members had a right to know who their fellow members were. This was the right that was privileged. Using this privilege the "Union" through the article sought to coerce the Appellees into joining the "Union". Clearly this act of coercion was not the purpose for which the communication was privileged. In using the article for this purpose it abused its privilege and is liable to the Appellees for so doing.

In *R. H. Bouligny Inc. v. U. S. Steel* 383 U. S. 145 it was held that jurisdiction for libel committed by Union during a labor dispute did not lie in the United States Courts but in the State Courts. Upon trial in the State Court North Carolina 154 S. E. 2nd 344, 356, it was held that the National Labor Relations Act does not take away this State (N.C.) jurisdiction to entertain and determine according to laws of this state actions for libel published by Union in course of an organizing campaign. Judgment for plaintiff may be rendered, if plaintiff alleges and proves actual malice sufficient to overcome the qualified privilege allowed Union by laws of this State and some actual damages resulting from libelous publication. With this modification, the rules of law applicable to trial of suits for libel generally in the Courts of North Carolina were held applicable to trial of such libel action.

In *San Diego Building Trades v. Garmon*, 359 U. S. 236, in determining pre-emption in any given labor case the State power is not precluded where challenged conduct is neither protected nor prohibited under the Federal Act.

In *Greenbelt Puv. Assn. v. Bresler*, 398 U. S. 6 (1970) malice was defined to include "spite, hostility or deliberate intention to harm and that malice could be found from the language of publication itself. The Court stated:

"This definition of malice is Constitutionally insufficient where discussion of public affairs

is concerned * * * Even where the utterance is false the great principle of Constitution which secures freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood."

It should be observed that in all the cases referred to as requiring proof of knowing or reckless falsehood; *Rosenblatt v. Baer*, 383 U. S. 75 (1966); *New York Times Co. v. Sullivan*, 376 U. S. 259 (1964); *Curtis Publishing Co. v. Butts*; 388 U. S. 130 (1967); *Thornhill v. Alabama*, 310 U. S. 88 (1940) were cases governed by Constitutional prohibition. As previously stated in *Linn* there is no Constitutional prohibition involved in libel by Union during a labor dispute.

The trial court in the case at bar in its instructions to the jury told them the occasion on which the statements were made was a privileged occasion and Appellants are not liable unless they abused such privilege and that Appellees in order to recover must prove actual malice and that the defamatory statements caused them damage, that the words must be construed according to usual construction and common acceptance under the circumstances, that is a labor dispute. The Court defined actual malice as conduct which shows that in printing words they were actuated by sinister or corrupt motive such as hatred, ill will or desire to injure Appellees or communication made with gross indifference or recklessness as to amount to a wanton or wilful disregard of the rights of Appellees.

The Appellants have never asserted by plea or otherwise that the words were true. Falsity was never an issue for in the absence of a plea of truth a presumption that they were false attaches. *Williams Printing Co. v. Saunders* 113 Va. 156; *James v. Powell* 154 Va. 96; *Carpenter v. Meredith* 122 Va. 446. Privilege is an affirmative defense and the ultimate facts upon which Appellants claim that it cannot be held liable in damages for a false statement, otherwise actionable must be alleged in the answer, *R. H. Bouligny, Inc. v. United Steel-*

workers,. Appellants did not assert in their defense lack of knowledge as to falsity of the statements published but elected to proceed on the theory that the statements were merely rhetorical hyperbole and not statements of fact, an issue the jury resolved against them. The Appellants say now as they did at the trial, that no one would have taken these charges seriously, that they were merely rhetorical hyperbole. Appellants in circulating the charge certainly knew they were false for they contend they were intended as a figure of speech and assert no one would have taken same seriously. Even were the *New York Times* standard applicable, under the circumstances of this case, Appellants in circulating the charges were aware same were false. In fact so much so that they assert now as they have throughout the proceeding no one would have taken same seriously. It also follows that Appellants circulated same without regard as to whether false or not. What was printed of Appellees was in fact a calculated falsehood, and the fact Appellants say this was a figure of speech, not to be taken seriously, does not make it any the less libelous, when the words do in fact make libelous charges. The jury was instructed as to circulating same in reckless disregard of rights of Appellees. Under the circumstances of this case State Jurisdiction was not preempted. The instructions in accord with the Virginia law were under the facts and evidence sufficient, whatever standard is applied. Appellants refer to *Greenbelt Pub. Assn. v. Bresler*, 398 U. S. 6 (1970). This case, as previously pointed out, is a case where a constitutional prohibition was involved and while the Judge defines malice as spite, hostility and deliberate intention to harm he also instructed Jury that malice could be found from the language of publication itself. The Court in holding this definition *constitutionally* insufficient points to that part of instructions permitting malice to be found from the language of publication itself. Since Jury could under this instruction have found malice from the language itself the definition was not constitutionally sufficient. In the

instant case, the Court defined the necessity of proving actual malice and did not tell the Jury they could find malice from the language of the publication itself. Thus even were a constitutional prohibition applicable the instructions under particular circumstances of this case were sufficient.

**B. Appellants Assert The Court Below Erred In Holding
The First Amendment Inapplicable.**

It is contended by Appellants that the *New York Times* standard as to free speech is applicable as in their view this was an issue of general or public interest and the constitutional limitations of the First Amendment is thereby applicable.

Factually aside from being an effort of "Union" by coercion to compel Appellees to join "Union" no labor dispute was involved. All except a handful of the carriers at the Richmond Post Office were already members of "Union". There was in progress at the time no organizing campaign as such. "Union" was already certified and there was no question as to certification raised at that time, no labor dispute between "Union" and Management was involved, no violence, no picketing and no disturbance of any kind. There was no publicity and the public had no interest whatsoever in whether Appellees joined "Union" or not. Appellees were in fact almost complete unknowns, their failure to join "Union" was unknown to Public and there was no general interest or public concern as to their lack of membership. Solely on the basis that efforts to persuade certain non members to join "Union" might in a very broad sense constitute under some definitions a labor dispute. "Union" asserts this became a matter of general or public interest, so as to make the *New York Times* standard applicable.

In *Linn* the Court specifically rejected adoption of the *New York Times* standard under any constitutional compulsion. It is now contended that this standard is applicable by reason of the broadening of the *New York Times* rule to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U. S.

130, and in *Rosenbloom v. Metromedia*, 403 U. S. 29, to include private individuals where a statement in a radio broadcast concerned an issue of public or general interest.

It would indeed be stretching the decision in *Rosenbloom* beyond all reasonable limits to hold that the fact a handful of postal carriers had failed to join "Union" that this was an issue of public or general interest. It makes little difference whether efforts of "Union" to induce them to join is classified as a labor dispute or not for it was not a matter of public or general interest and the decision of the individuals was certainly a personal one to them. What possible interest could the public have in whether they joined or not, and wherein could it be said this is a matter of general interest within the definition and intentment of *Rosenbloom*.

"Union" contends that this falls within their right to communicate about a matter of concern to members of a special audience. It is one thing however to say that one has a right to communicate to a "special audience" it is something else again to say that what one conveys or has a right to convey to a special audience thereby becomes a matter of public or general interest. The two terms are not synonymous but are directly conflicting, for special audience does not mean general or public but would seem to be the exact opposite.

See *Cantwell v. Conn.* 310 U. S. 296 (1940) wherein this Court stated that resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. This was also stated in *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942). Appellants contend that while Appellees have a right to refuse to join "Union" that "Union" has a right to identify the non members to the members. We do not quarrel with their right to identify the Appellees as non members, however we do say that they do not have the right to do so by means of vicious, scurrilous and libelous attacks upon them, nor does it give them the right to use coercive tactics. None of the cases referred to indicate that "Union" possesses any such right.

The facts here are greatly different from those in

Rosenbloom v. Metromedia. Whether Appellees joined "Union" or not was certainly a matter of less than general concern. While organization and maintenance of "Union" may be a matter of general interest, a dispute between a well established labor organization and a non union worker lacks the necessary social and economic significance to be termed matters of general concern.

Senn v. Tile Layers, 301 U. S. 468 (1967) is no authority in this situation as to what constituted a labor dispute. The Court stating determination of what was a labor dispute under the statute of Wisconsin was a matter for the Wisconsin Courts (pg. 477); and what constitutes a labor dispute within the State statute does not determine what constitutes a labor dispute elsewhere. *Senn* does not hold Union could make known the facts of a labor dispute because of Freedom of Speech protected by First Amendment as contended by Appellant on page 19 of their brief. The sole purpose of Union says the Court was to acquaint the public with the facts and by gaining support induce *Senn* to unionize.

In *Rosenbloom v. Metromedia* it is stated that a matter of public or general interest cannot suddenly become less so because a private individual is involved. The Court goes on to state, the public focus is on the conduct of the participant, and the content, effect and significance of the conduct, not the participants prior anonymity or notoriety. In a footnote p. 44 the Court states:

"We are not to be understood as implying that no area of a persons activity falls outside the area of public or general interest. We expressly leave open the questions of what constitutional standard of proof, if any, controls the enforcement of state libel laws for detamatory falsehood published or broadcast by the News media about a persons activity not within the area of public or general concern."

Even where labor disputes become matters of public or general concern it is difficult to see that whether a particular employee had elected to join Union or not is within the area of public concern.

While under a broad definition a labor dispute may be a matter of public interest and concern, particularly where such a dispute might shut down the postal service. Yet there must be areas in the broad definition of a labor dispute within which the public has no interest and which are not matters of general concern. The sole labor dispute in the instant case was the fact Appellees had elected not to join "Union". There was no other dispute. Appellees submit that their decision as to joining was private and is outside of the area of public or general concern.

II. APPELLANTS ASSERT THE PUBLICATION IN ISSUE IS PROTECTED AGAINST STATE COURT DAMAGE SUITS BY THE FIRST AMENDMENT AND NATIONAL LABOR LAW.

A. Appellants Assert Since Appellees Alleged No Facts Showing Defamatory Falsehood, *New York Times* Protects The Publication.

The essence of "Unions" argument here is that the article published of and concerning the non members was nothing more than colorful rhetoric and hyperbole. The contention being that the publication in issue contains but one statement of fact that Appellees were non members of "Union". Careful distinction must be drawn between those cases cited, wherein the language used was a class indictment and not directed against a specified particular individual and the case before this Court wherein the publication was directed against specified individuals by name. "Union" says the publication imports no statement of fact except that the individuals were non members of "Union". Accusing the Appellees of having "rotten principles", of

"lacking character", and of "committing the crime of treason" may be construed as statements of fact which from their usual construction and common acceptance in the circumstances under which they were uttered are susceptible of being defamatory. "Union" would relate what was said to characterization pertaining to an entire class, however in so doing they fail to mention that the published description of a "Scab" was applied specifically to each of the Appellees by name. It is not the use of the word "Scab" that constitutes the libel in this case it is attributing to each of the Appellees by name the defamatory description.

For words to be considered as defamatory and actionable it is not necessary that the defamation charge be in direct terms. It may be made by inference, implication, innuendo or insinuation, *Carwile v. Richmond Newspapers*, 196 Va. 1 (1954) at page 7; *James v. Powell*, 154 Va. 96.

Throughout Appellants brief appears the contention that the defamatory article was mere hyperbole. It is contended that there is nothing factual therein. Appellants select parts such as the description of a scab as having a corkscrew soul, a water brain, a back bone of jelly and glue. They say no one would take this seriously and that it is merly colorful hyperbole. To say one has a corkscrew soul, a water brain, a back bone of jelly and glue carries an implication of a derogatory nature such as corkscrew soul and water brain carry an implication of lack of ability to make positive or firm decision and a backbone of glue and jelly, carries a meaning of lack of character and lack of intestinal fortitude. However, what about the statement "He carries a tumor of rotten principles". To say this of a person is certainly a libelous statement of fact. So much so, that even the Secretary of the "Union" local testified that he thought they had rotten principles. Again the article compares a scab to Judas, who is termed a gentlemen compared to a scab. It being stated the scab does not have character

enough to hang himself. Certainly lack of character is a statement of fact. The Appellees are finally compared to Esau, Judas and Benedict Arnold and accused of being traitors to their God, their country, their family and class.

For language such as the foregoing "Union" asks constitutional protection. This in the face of this Courts holding in *Linn* that malicious libel enjoys no constitutional protection in any context. "Union" in asserting that the language used constituted nothing but rhetorical hyperbole ignores the actual accusation directed against each of the Appellees.

Testimony at the trial clearly shows that the reason Appellees did not join the "Union" was because it was a matter of principle to them.

In "Restatement of Torts" § 565: "A defamatory communication may consist of a statement of fact."

"To be defamatory under the rule stated in this section it is not necessary that the accusation or other statement be by words. It is enough that the communication be reasonably capable of being understood as constituting a charge of a specific act or omission. Thus, another may be defamed by a statement that he associates with persons of notoriously disreputable character or by attributing to him the characteristics of literary or historical figures of ill repute."

In *Youngdahl v. Rainfair*, 355 U. S. 131, (1957) petitioners urged that abusive language such as scab and variations thereof were constitutionally protected. The Court citing *Chaplinsky* said it could not agree. Words can become so coupled with conduct as to provoke violence:

"If a sufficient number yell any word sufficiently loudly showing intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasive and become intimidation and incitement to violence."

**B. Appellants Assert The Very Statements In Issue Have
Been Held Protected Under National Labor Policy.**

Appellants in their brief at page 33, incorrectly cite the *Clay Products Co.* 106 NLRB 267 (1953). True, the National Labor Relations Board did hold the dissemination of a leaflet containing the Jack London definition of a "scab" was "permissible". However, in its statement, the Court was referring to a single incident reported in *H. N. Thayer Co.*; 92 NLRB 1122 at page 1217. In that case, seven union members visited the home of a non-union employee during a labor dispute. While six of the union members milled around on the sidewalk in a show of strength, the remaining member placed a leaflet containing the article on the doorstep of the non-union employee's home. There was no violence involved in this act. The Board was confronted with the question of whether or not the acts of the seven union members in their mass visit to the non-union employee's home constituted such acts of violence as to deny these seven people reinstatement of employment. The Board held that their acts were not illegal. This decision was in light of similar incidents where those union members who remained out on the street carried lead pipes and shouted threats to the non-union employee being visited.

Obviously, the activity that was held to be "permissible" was the peaceful visit and not the Jack London article itself. It was only incidental to the Board's ruling that the leaflet contained the Jack London article in question. Even if the Board did give consideration to the article, nowhere in either the *Cambria Clay Products* case or the *H. N. Thayer* case was any specific employee's name ever mentioned in connection with the Jack London article defining the term "scab".¹ There, the use of this

¹ On page 53 of the Appendix where Mr. Fiester, a union leader for over 30 years and President of the International Labor Press Association AFL-CIO, on cross-examination by Mr. Kapral, stated that he had never seen the Jack London article appear listing certain person's names.

article could only be intended as a broad class indictment as it was not directed toward any individual nor was it used to injure any specific employee in his relationship and reputation with his fellow employees with the ultimate goal being to coerce him into joining the union.

The Appellees would point out that the cases cited from the National Labor Relations Board are not particularly controlling in the case at hand. The purpose and construction of the National Labor Relations Board is to insure the industrial peace of the nation. Although the Board has an interest in the individual, its major concern is regulating the relationship between organized labor and management as a whole. For this very reason, state courts have not been preempted from adjudicating the rights of individuals such as the Appellees. The question of defamation properly remains within the jurisdiction of state courts whose trier of fact is best able to make the proper determination in defamation suits.

"Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation - whether he be an employer or union official - has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.

"On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by

malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for the pre-emption."²

Appellees contend that the subject of this case is of mere peripheral concern to the National Labor Relations Laws. There was no congressional indication that the Federal labor laws were intended to deprive the states of their power to protect the individual in the security of his reputation. *International Association of Machinists v. Gonzales*, 356 U. S. 617 (1958).

Therefore, the determination by the National Labor Relations Board as to use of the Jack London article under the foregoing circumstances has no bearing to the particular facts of this case where the article was directed at these specific Appellees by name in order to injure them in their reputation and to ostracize them from their fellow employees.

III. APPELLANTS ASSERT THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE

The Appellants in contending that the Virginia Statute is unconstitutional for overbreadth rely upon *Gooding v. Wilson*, 405 U. S. 518 (1972) wherein a Criminal Statute of the State of Georgia was held unconstitutional. This decision by a divided Court with two members not participating, turns upon the construction placed upon the Statute by the Georgia Courts and upon the Criminal aspect of the statute involved. The Supreme Court of Virginia has held that a civil action brought under Code Section 8-630, the insulting words statute, is one for libel and slander and the common law rules for slander are to be applied even though the language used is defamatory on its face. *M. Rosenberg & Sons v. Craft*, 182 Va. 512; 528; 29 S. E. (2nd) 375, 382-83 (1944). *Carwile v. Richmond Newspapers, Inc.*; 196

2

Linn v. United Plant Guard Workers, 383 U. S. 53 (1966)

Va. 1, 6, 82 S. E. 2nd 588, 591 (1954) *Shupe v. Rose's Stores, Inc.* 213 Va. 374. The gist of an action under the Virginia Statute of Insulting Words is the insult to the feelings of the offended party, *Cook v. Patterson Drug Co.* 185 Va. 516, and the insult is the basis for the action; *Brooks v. Calloway*; 12 Leigh (39 Va.) 466. The criminal statute in the *Gooding* case was held unconstitutional as being vague and overbroad because it had not been narrowed by Georgia Appellate Courts to apply only to fighting words which by their very utterance – "tend to incite an immediate breach of peace."

The Virginia Statute of Insulting Words as do similar statutes in most of the states, exist independent of any labor dispute. The constitutionality of such statutes has been accepted by the Courts over the years. See "Corpus Juris Secundum Constitutional Law," Vol. 16, 213 (2) citing in support of the general rule that defamatory utterances are not within the area of constitutionally protected speech and citing: *Roth v. U. S.* 77 Sp. Ct. 1304; 354 U. S. 476; 1 L. Ed. 2nd 1498, rehearing denied 78 Sp. Ct. 8; 355 U. S. 852 *New York Times Co. v. Sullivan*, 84 Sp. Ct. 710; 376 U. S. 254. *Linn v. Plant Guard Workers of Am. Local 114*; 86 Sp. Ct. 667; 383 U. S. 53.

The difficulty of defining libel has often been referred to and it has been said that attempts to define libel although practically innumerable have never been so comprehensive and accurate as to comprehend all cases that may arise. "Corpus Juris Secundum Libel and Slander. Vol. 53, Sec. 1." In the interpretation of words "slanderous" under the Virginia Statute of Insulting Words the Common Law rules for slander are to be applied. The foundation of such actions for defamation is the injury done to reputation; that is injury to character of an individual whereas in *Gooding* the foundation upon which criminal action was based was fighting words which tend to incite an immediate breach of peace and the failure to define these words resulted in the statute being declared unconstitutional.

In addition to overbreadth it is contended that the Virginia Statute of Insulting Words Virginia Code 8-630 is also void for vagueness. In *Coates v. Cincinnati*; 402 U. S. 611 relied upon by Appellants, the use of word "Annoy" in connection with a criminal offense making it unlawful to assemble on the sidewalks in a manner annoying to people was vague because it subjected right of assembly to an unascertainable standard of conduct; for what may be annoying to one person may not be annoying to others. The value protected by libel laws are (1) the desire of the individual to preserve a certain privacy around his personality from unwarranted intrusions and (2) a desire to preserve his public good name; *Rosenbloom v. Metromedia*; 403 U. S. 29. It has been held that society has a strong interest in preventing and redressing attacks on reputation. *Rosenblatt v. Baer*; 383 U. S. 75, 87.

The injury in libel and slander is to the feeling and reputation of the individual. In *Rosenblatt v. Baer*; 383 U. S. 75, 93, Justice Stewart in note on page 93, refers to the following:

"Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder. They live within the genuine orbit of the common law, and in the distribution of American Sovereignty they fall exclusively within the jurisdiction of the states."

The Statute asserted to be unconstitutional for vagueness as interpreted is but an extension of the common law which is within the jurisdiction of the State.

The objection as to vagueness of this statute and of overbreadth are not applicable under the construction and limitations of the Supreme Court of Virginia.

There is another rule stated in *Broadrick v. Oklahoma*, 41 U. S. L. W. 5111 (1973)

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied

will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

The language published by the Appellants of Appellees would have been equally defamatory whether treated as common law libel or whether treated as coming under the Virginia Statute of Insulting Words. The Court elected to treat the language as coming under the Statute.

In *Carwile v. Richmond Newspapers, Inc.* 196 Va. 1 (1954), it is stated at page 6 as follows:

"An action for insulting words under Code, § 8-630 is treated precisely as an action for slander or libel, for words actionable *per se*, with one exception, namely, no publication is necessary. The trial of an action for insulting words is completely assimilated to the common law action for libel or slander. . *Darnell v. Davis*, 190 Va. 701, 58 S. E. (2d) 68; *W. T. Grant Co. v. Owens*, 149 Va. 906, 141 S. E. 860; *Guide Pub. Co. v. Futrell*, 175 Va. 77, 7 S. E.

(2d) 133

"At common law defamatory words which are actionable *per se* are: (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, which if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. (4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damage are actionable

"(2) Although varying circumstances often make it difficult to determine whether particular language is defamatory, it is a general rule that allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used. In order to render words defamatory and actionable it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication or insinuation. *James v. Powell*, 154 Va. 96, 152 S. E. 539; *Moss v. Harwood*, 102 Va. 386, 46 S. E. 385; 53 C. J. S. §9, 10, pp. 46, 47."

It is further stated in *Broadrick v. Oklahoma*:

"Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."

As had been noted by the Supreme Court of Virginia:

"In Virginia we have held that a civil action brought under Code § 8.630, the insulting words statute, is one for libel or slander and the common-law rules of slander are to be applied, even though the language used is defamatory on its face. *M. Rosenberg & Sons v. Craft*, 182 Va. 512, 528, 29 S. E. 2d 375, 382-83 (1944); *Carwile v. Richmond Newspapers, Inc.* 196 Va. 1, 6, 82 S. E. 2d 588, 591 (1954); *Shupe v. Rose's Stores, Inc.* 213 Va. 374, _____ S. E. 2d _____, this day decided."

"..... Under our construction and limitations of Code § 8-630, only those words which are not protected by the First Amendment are actionable under the statute."

IV. APPELLANTS ASSERT THE DAMAGE AWARD WAS EXCESSIVE

In *Linn v. Plant Guard Workers*, this Court laid down a test for the determination of the question of damages. That test being that in order for a Plaintiff to collect damages, he must show proof of harm such as general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. In determining damages, the jury may consider all of these factors. The duty of the Court to examine the damages that have been determined by a jury as to whether or not the amounts are excessive arises only in the most extreme cases where the amount of damages is indeed outrageous and all mankind at first blush may think so. *VanLom v. Schneiderman*, 210 P. 2d 461.

It is for the jury as the trier of fact in the first instance to determine the amount of damages that are to be awarded. Only when the jury abuses its discretion in this matter is the Court called upon to review the amount awarded. The Court may not use its power of review in the name of correcting an abuse of discretion to make the findings of a jury a nullity.

In the case at hand, the Appellees suffered general injury to reputation without question. They experienced consequent mental suffering in that they testified before the jury that because of working in a hostile atmosphere and then suffering social indignities and people introducing them as "scabs" caused tension resulting in severe migraine headaches. Further testimony before the jury showed that they experienced alienation of associates. Austin testified that he had associated with his fellow employees for 14 years and only when this article was published did they refuse to associate with him. Ziegegeist experienced not only alienation from fellow employees but also marital strife and family discord as a direct result of this article. Brown stated that he was made the object of ridicule by formerly friendly co-workers. The record further shows that pecuniary loss occurred as a result of this article in that loss of time from work was testified to before the jury.

The jury after carefully considering the evidence,

for which the test in *Linn* calls; determined in their best judgment an adequate amount of damages. Professor Newell in his treatise on slander and libel says:

"The amount at which general damages are to be assessed lies almost entirely within the discretion of the jury A new trial will only be granted if the verdict is so large as to satisfy the Court that it was perversely in excess, or the result of some gross error on a matter of principle; it must be shown that the jury either misconceived the case or acted under the influence of undue motives."
Newell on Slander and Libel, pg. 1026 - § 997
DAMAGES - IN THE DISCRETION OF JURY.

Appellees contend that the jury properly considered all of the elements of the test as laid out in the *Linn* case and arrived at a just verdict.

Appellants would have this Court reduce the compensatory and punitive damages, upheld by the Supreme Court of Virginia, to an amount commensurate with the maximum \$500.00 fine as provided for in Virginia's Criminal Law Section of its Code. With this we cannot agree in that the two cannot be compared. By their very nature, punitive damages serve a purpose of deterrence which the criminal law fine of \$500.00 cannot begin to fulfill. One must bear in mind that we are dealing here with three low ranking postal employees who have been damaged by a multi-million dollar national union.

In assessing the amount of exemplary damages the Jury was entitled to take into consideration the malice or wantonness of the act complained of, and all the circumstances that go to aggravate the case. They were entitled to consider the station of the parties and the size and financial standing of the Appellants. There was no apology, either prior to or at the trial, and the

Appellants took the position that none would be made. The publication was made after one of the Appellees had protested prior publication of his name as a "Scab". Aggravation and malice were shown to a high degree as well as a preconceived and concerted effort to use this as a means of compelling Appellees to join "Union". There was an utter and reckless disregard of the rights of Appellees to enjoy the peaceful pursuit of their employment. There was present here ill will and evil motive.

An award of \$100,000.00 as punitive damages against a Union because of actions of its agents in attempting to prevent employees from proceeding with their work unless they joined the Union, has been held, not excessive.

"The general rule is that there is no fixed standard for the measurement of exemplary or punitive damages and the amount of the award is largely a matter within the discretion of the Jury." *United Constr. Workers v. Laburnum Constr. Corp.* 194 Va. 872.

This award was approved by the Supreme Court of United States; *United Constr. Workers v. Laburnum Constr. Corp.* 347 U. S. 650 and in *Automobile Workers v. Russell*; 356 U. S. 634 at page 646 the Supreme Court of United States stated:

"Punitive damages constitutes a well settled form of relief under the law of Alabama" *

* * In *Laburnum (United Workers v. Laburnum, supra)*, we approved a judgment which included \$100,000.00 in punitive damages."

In light of these facts, neither the compensatory damages of \$10,000.00 per man nor the punitive damages of \$45,000.00 per man are excessive.

CONCLUSION

For the reasons stated the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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I hereby certify that copies of the foregoing Brief For
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All parties required to be served have been served in accordance with Rule 33 of the Rules of the Supreme Court of the United States.



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October Term, 1979

No. 00-109

Old Dominion Union No. 488, National
Association of Letter Carriers, AFL-CIO,
and
National Association of Letter Carriers,
AFL-CIO, Appellants,
v.
Henry M. Admin, L. B. Hays, and Rex R.
Hammaker, Appellees.

On Appeal From a Judgment of the Supreme
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IN FURTHER SUPPORT OF THE NATIONAL RIGHT TO WORK LEGAL
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TABLE OF CONTENTS

	Page
INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. EXERCISE OF STATE COURT JURISDICTION IS NOT PRECLUDED BY NATIONAL LABOR POLICY WHERE CONDUCT NOT PROTECTED UNDER THE LABOR MANAGEMENT RELATIONS ACT IS INVOLVED	5
II. THE VIRGINIA INSULTING WORDS STATUTE IS CONSTITUTIONAL BECAUSE IT IS A DEFAMATION STATUTE AND BECAUSE IT DOES NOT PROSCRIBE SPEECH PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS	8
A. Defamatory speech is not protected under the First and Fourteenth Amendments	8
1. What constitutes defamation	8
2. The First and Fourteenth Amendments have never protected defamation	11
B. Virginia's statute is a defamation statute ..	14
III. THE CIRCUMSTANCES IN THIS CASE CLEARLY SHOW THAT THE <i>New York Times</i> STANDARD IS NOT APPLICABLE	19
IV. SHOULD THIS COURT FIND THAT THE <i>New York Times</i> STANDARD OF MALICE DOES APPLY, THE DECISION SHOULD NOT BE REVERSED BECAUSE THE <i>New York Times</i> MALICE DEFINITION HAS BEEN SATISFIED	25
V. CONCLUSION	28

INDEX OF AUTHORITIES CITED

	Page
CASES:	
<i>Albert Miller & Co. v. Corte</i> , 107 F.2d 432 (5th Cir. 1939)	9
<i>Brantley v. Devereaux</i> , 237 F. Supp. 156 (E.D. S.C. 1965)	7
<i>Brown v. DuFrey</i> , 1 N.Y.2d 190, 134 N.E.2d 469 (N.Y. 1956)	9
<i>Beauharnais v. Illinois</i> , 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), <i>reh. den'd</i> , 343 U.S. 988, 72 S.Ct. 1070, 96 L.Ed. 1375 (1952)	11, 12
<i>Cafeteria Union v. Angelos</i> , 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943)	23
<i>Caldwell v. Crowell-Collier Publishing Co.</i> , 161 F.2d 333 (5th Cir. 1947), <i>cert. den'd</i> , 332 U.S. 766, 68 S.Ct. 74, 92 L.Ed. 351 (1947)	11, 13
<i>Cantwell v. Connecticut</i> , 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)	13
<i>Carwile v. Richmond Newspapers</i> , 196 Va. 1, 82 S.E.2d 588 (1954)	15
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)	13, 14, 16, 19
<i>Civil Service Commission v. Letter Carriers</i> , U.S. , 93 S.Ct. 2880, L.Ed.2d , 41 L.W. 5122 (1973)	17
<i>Cohen v. California</i> , 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)	11
<i>Curtis Publishing Co. v. Butts</i> , 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)	13
<i>Daniels v. Allen</i> , 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953)	27
<i>D'Amato v. Freeman Printing Co.</i> , 38 Wis.2d 589, 157 N.W.2d 686 (Wis. 1968)	9
<i>Garner v. Teamsters Union</i> , 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953)	5
<i>Gooding v. Wilson</i> , 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed. 2d 408 (1972)	16, 19
<i>Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n, AFL-CIO</i> , 382 U.S. 181, 86 S.Ct. 3207, 15 L.Ed.2d 254 (1965)	5
<i>Houston Printing Co. v. Moulden</i> , 15 Tex.Civ.App. 574, 41 S.W. 381 (Ct. of Civ.App. 1897)	9

Table of Contents Continued

iii

	Page
<i>Hughes v. Samuels Bros.</i> , 179 Iowa 1077, 159 N.W. 589 (Iowa 1916)	9
<i>International Union, UAW, AFL, Local 232 v. Wisconsin Employment Relations Board</i> , 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949), <i>reh. den'd</i> , 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121 (1949)	5
<i>J.E. Riley Inv. Co. v. C.I.R.</i> , 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36 (1940)	27
<i>Linn v. United Plant Guard Workers of America, Local 114, et al.</i> , 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966)	7, 8, 19, 20, 21, 22
<i>Local 15 of Independent Workers of Noble County, Inc. v. IBEW</i> , 273 F. Supp. 313 (N.D. Ind. 1967)	9
<i>Local 100 of United Association of Journeymen and Apprentices v. Borden</i> , 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963)	6
<i>Marsh v. Commercial and Savings Bank of Winchester, Virginia</i> , 265 F.Supp. 614 (W.D. Va. 1967)	15
<i>Maryland Drydock v. NLRB</i> , 183 F.2d 538 (4th Cir. 1950)	11, 12
<i>McAndrew v. Scranton Republican Pub. Co.</i> , 165 Pa. Super. 276, 67 A.2d 730 (Super.Ct. 1949)	8
<i>Miller v. California</i> , — U.S. —, 93 S.Ct. 2607, — L.Ed.2d —, 41 L.W. 4925 (1973)	16, 17
<i>Near v. Minnesota</i> , 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)	12
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)	13, 19, 20, 21, 22, 23, 24, 25, 27
<i>NLRB v. International Longshoremen's Association</i> , 332 F.2d 992 (4th Cir. 1964)	22
<i>Owens v. Scott Publishing Co.</i> , 46 Wash.2d 666, 284 P.2d 296 (1955), <i>cert. den'd</i> , 350 U.S. 968, 76 S.Ct. 437, 100 L.Ed. 840 (1956)	10
<i>O'Neil v. Edmonds</i> , 157 F.Supp. 649 (E.D. Va. 1958) ...	15
<i>Peoples Life Ins. v. Talley</i> , 166 Va. 464, 186 S.E. 42 (1936)	15
<i>Porter v. Kimzey</i> , 309 F.Supp. 993 (N.D. Va. 1970), <i>aff'd</i> , 401 U.S. 985, 91 S.Ct. 1237, 29 L.Ed.2d 525 (1971)	12
<i>Robertson v. Baldwin</i> , 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897)	12

	Page
<i>Rosenbloom v. Metromedia, Inc.</i> , 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971)	13
<i>Sacs v. Local 48, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO</i> , 454 F.2d 879 (4th Cir. 1972)	22
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)	6
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80, 63 S.Ct. 454, 87 L. Ed. 626 (1943)	27
<i>Senn v. Tile Layers Union</i> , 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937)	23
<i>Thornhill v. Alabama</i> , 310 U.S. 88, 60 S.Ct. 736, 84 L. Ed. 1093 (1940)	14, 23
<i>Trimble v. Johnston</i> , 173 F.Supp. 651, (D.D.C. 1959) ..	12
<i>Ward v. Painters Local 300</i> , 41 Wash.2d 859, 252 P.2d 253 (Wash. 1950)	9
<i>Williams Printing Co. v. Saunders</i> , 113 Va. 156, 73 S.E. (472 Va. 1912)	12
<i>Wojcik v. Ming</i> , 186 N.Y.S.2d 937 (App.Div. 1959) ...	22

CONSTITUTIONAL PROVISIONS AND STATUTES

Executive Order 11491, 34 Fed. Reg. 17,787 (1970)	3
First Amendment, United States Constitution ..11, 14, 17,	23, 25
Fourteenth Amendment, United States Constitution ..	11
Labor Management Relations Act, 29 U.S.C. § 141 et seq.	3, 4, 6, 19
Postal Organization Act, 39 U.S.C. § 101, et seq. (1972 supp.)	3
Virginia Insulting Words Statute, Code of Virginia Annotated (1950), § 8-630	4, 14, 15, 16, 17, 18, 19, 23

MISCELLANEOUS

Jury Instructions No. 4	18
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH No. 496, NATIONAL
ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
and
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, *Appellants*,

v.

HENRY M. AUSTIN, L. D. BROWN, and ROY P.
ZIEGENGEIST, *Appellees*.

On Appeal From a Judgment of the Supreme
Court of Virginia

**BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION AS AMICUS CURIAE**

This brief amicus in support of the position of the Appellees, Henry M. Austin, L. D. Brown, and Roy P. Ziegengeist, and in support of the legal rights of other non-union employees in the United States, is filed by the National Right to Work Legal Defense Foundation with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

**INTERESTS OF THE NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION**

The National Right to Work Legal Defense Foundation is an organization formed to protect the right to work, freedom of association, and other fundamental liberties of ordinary working men and women

where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation is vitally interested in aiding any employee whose human and civil rights have been abridged or are about to be abridged through the injustices arising out of compulsory unionism arrangements. Thus, it is concerned with protection of the legal right of any individual to refrain from joining or paying dues to a labor organization against his will, and with compensation for damages where this legal right has been abridged.

There are responsibilities which are inherent in organizing activities. Subjecting an individual or individuals to defamatory and damaging epithets, which are calculated to create an atmosphere of violence and coercion, is a perversion of the legitimate objectives of unionism and cannot and must not be condoned. With organizing activities goes both a moral and legal responsibility on the part of the union to treat the unorganized in a civilized and humane manner.

STATEMENT

Appellant Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, hereafter referred to as Branch, is a local union which is an agent of and is affiliated with Appellant National Association of Letter Carriers, AFL-CIO, hereafter referred to as NALC. Under Executive Order 11491, and, subsequently, the Postal Reorganization Act and the National Labor Relations Act, the postal authorities at all relevant times have recognized NALC as the national and Branch as the local exclusive collec-

tive bargaining representative of letter carriers in the Richmond, Virginia area. During the period relative herein, the Appellees, letter carriers, were not members of NALC but were forced as a result of Executive Order 11491 to be represented by NALC and its agent Branch.

Branch from time to time published the names of nonmembers, including the Appellees, under the heading "List of Scabs" in its monthly newsletter, which is distributed by mail to the members of Branch. In the June, 1970 issue, Branch printed the "List of Scabs" and, along with this list, a highly uncomplimen-

¹"The Scab"

"Some co-workers are in a quandary as to what a scab is; We submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab.

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of Hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class."

tary libelous statement on "What a Scab Is." This issue was posted on a post office bulletin board where anyone could see it.

As a result of these malicious, insulting, defamatory, and slanderous statements, the Appellees filed suit against the Appellants in the Law and Equity Court of the City of Richmond, Virginia under the Virginia Insulting Words Statute, Code of Virginia Annotated (1950), § 8-630. The jury returned a verdict awarding each of the Appellees \$10,000 in compensatory damages and \$45,000 in punitive damages. On appeal, the Supreme Court of Virginia rejected Appellants' claims that the insulting words statute, on its face and as here applied, violated Appellants' right to freedom of speech.

SUMMARY OF ARGUMENT

→ This Court has held that the exercise of state court jurisdiction is not precluded by national labor policy where the conduct in question was not protected under the Labor Management Relations Act. The conduct in issue, in this case, is prohibited by the Virginia Insulting Words Statute, which is constitutional because it is a defamation statute and because it does not proscribe speech protected under the First and Fourteenth Amendments. The First and Fourteenth Amendments have never protected defamation.

The circumstances in this case clearly show that the Virginia Supreme Court of Appeals correctly held that the *New York Times* standard of malice is not applicable. However, should this Court find that this standard of malice does apply, the decision of the Virginia Supreme Court of Appeals should not be reversed because this standard has been met.

ARGUMENT

I

EXERCISE OF STATE COURT JURISDICTION IS NOT PRECLUDED BY NATIONAL LABOR POLICY WHERE CONDUCT NOT PROTECTED UNDER THE LABOR MANAGEMENT RELATIONS ACT IS INVOLVED.

In the field of labor relations, there are some areas which are not preempted by the exclusive jurisdiction of the National Labor Relations Board under the Labor Management Relations Act, 29 U.S.C. § 141 et seq. Activities engaged in by unions and employers arising out of a labor dispute may be regulated by the states if such activities are neither protected nor prohibited under the Labor Management Relations Act, and do not come within the legislative purpose of that statute. *International Union, UAW, AFL, Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh.den'd* 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121 (1949) and *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n, AFL-CIO*, 382 U.S. 181, 86 S.Ct. 3207, 15 L.Ed. 2d 254 (1965). The federal statute does not impliedly exclude the exercise of state powers in the case of conduct which the National Labor Relations Board is without express power to prevent and which therefore either is governable by the state or is entirely ungoverned. *Garner v. Teamsters*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953) and *UAW v. WERB, supra*.

Mr. Justice Jackson said, for a unanimous Court in *Garner v. Teamsters Union, supra*:

The . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible. 346 U.S. at 488, 74 S.Ct. at 164, 98 L.Ed. at 238.

Then in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), this Court emphasized that it was for the Board and the Congress to define the "precise and closely limited demarcations that can be adequately fashioned only by legislation and administration," while "our task is confined to dealing with classes of situations." 359 U.S. at 242, 79 S.Ct. at 778, 3 L.Ed.2d at 781. In this respect, it concluded that the states need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 243-244, 79 S.Ct. at 779, 3 L.Ed.2d at 782. This Court, citing *Garmon, supra*, in *Local 100 of United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 693-694, 83 S.Ct. 1423, 1425, 10 L.Ed.2d 638, 641 (1963) said:

In the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential if the danger of state interference with national policy is to be averted, . . . and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal pre-emption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance.

In this case the conduct in question is not subject to the jurisdiction of the Board and there is present a compelling state interest to prevent language insulting and abusive to its citizens and designed to incite violence and breach of the peace. This is not an action that involves regulation of labor relations and it is not concerned with the merits of a labor dispute. *Brantley v. Devereaux*, 237 F.Supp. 156 (E.D.S.C. 1965).²

In *Linn v. United Plant Guard Workers of America, Local 114, et al.*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), a case involving defamatory statements made during an organizing campaign, this Court said:

We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the Court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. 383 U.S. at 55, 86 S.Ct. at 658, 15 L.Ed.2d at 586.

This Court said that although the Board "tolerates intemperate, abusive and inaccurate statements made by the union during the attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false." 383 U.S. at 61, 86 S.Ct. at 662, 15 L.Ed.2d at 589.

The Appellant would have this Court believe that the insulting language used in this case was protected

² This case involved a false statement made by an employer about a union member during a bargaining session. The defamed individual brought a common law action for slander. The court refused to dismiss the case on the basis of pre-emption.

under the *Linn* decision. Nothing could be further from the truth. This Court said in *Linn*:

But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses. 383 U.S. at 63, 86 S.Ct. at 663, 15 L.Ed. 2d at 590.

This Court in *Linn* recognized that the Board cannot award any damages, impose any penalty, or give any other relief to a defamed individual. In fact, this Court pointed out:

On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption. 383 U.S. at 63-64, 86 S.Ct. at 663-664, 15 L.Ed.2d at 590.

II

THE VIRGINIA INSULTING WORDS STATUTE IS CONSTITUTIONAL BECAUSE IT IS A DEFAMATION STATUTE AND BECAUSE IT DOES NOT PROSCRIBE SPEECH PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A. Defamatory Speech Is Not Protected Under the First and Fourteenth Amendments.

1. What constitutes defamation.

A communication is "defamatory" if it tends to harm the reputation of another so as to lower him in the estimation of the community, or to deter third persons from associating or dealing with him. *McAndrew v. Scranton Republican Pub. Co.*, 165 Pa. Super.

276, 67 A.2d 730 (Super. Ct. 1949); *Albert Miller & Co. v. Corte*, 107 F.2d 432 (5th Cir. 1939); and *D'Amato v. Freeman Printing Co.*, 38 Wis.2d 589, 157 N.W.2d 686 (Wis. 1968). It has also been said that 'defamation' is that which tends to injure the reputation or to diminish the esteem, respect, good will, or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff. *Local 15 of Independent Workers of Noble County, Inc. v. IBEW*, 273 F.Supp. 313 (N.D. Ind. 1967). In *Ward v. Painters Local 300*, 41 Wash.2d 859, 252 P.2d 253 (Wash. 1950) the court said, while permitting as privileged comments about a union official, that a publication is libelous or actionable per se, if, among other things, it tends to harm one in his business or occupation.

An allegedly libelous matter is defamatory not only if it subjects a party to hatred, contempt, or ridicule by asserting some moral discredit on his part, but also if it tends to make him be shunned or avoided, or deprived of the friendly association of a considerable number of respectable members of a community, though it imputes no moral turpitude to him. *Brown v. DuFrey*, 1 N.Y.2d 190, 134 N.E.2d 469 (N.Y. 1956). Defamation consists in malicious poisoning of the minds of others against the libeled party by printing, writing, or otherwise publishing libel, whether done directly by the wording or indirectly by insinuation, imputation, or suggestion. *Hughes v. Samuels Bros.*, 179 Iowa 1077, 159 N.W. 589, 592 (Iowa 1916).

Any written words are defamatory which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which thus, by engendering an evil opinion of him in the minds of right thinking men, tend to deprive him of their friendly intercourse and society. *Houston Printing Co. v. Moulden*, 15 Tex.Civ.App. 574, 41

S.W. 381, 386 (Ct. of Civ. App. 1897); *Owens v. Scott Publishing Co.*, 46 Wash.2d 666, 284 P.2d 296 (1955), cert.den'd 350 U.S. 968, 76 S.Ct. 437, 100 L.Ed. 840 (1956).

No statement is actionable as defamatory if it is privileged. However, the Union Appellants have no legal interest which entitled them to use the very extreme, false, ungrounded, and abusive statements directed toward the Appellees. Secondly, Appellants cannot claim an honest belief that Appellees are without character, unprincipled, and traitors to their country, families, and fellow working man. Thus, they cannot claim that their defamatory statements were privileged. *Owens v. Scott Publishing Co.*, *supra*.

In this case there is no common interest evident which would justify the epithets which came from the Union publications and which were directed toward the Appellees to abuse and insult them. The Union could have informed its members of the actions of Appellees without resorting to the extremely irresponsible statements and descriptions which it made, especially owing to the fact that the Appellees' non-membership status was and still is within the provisions of the law governing labor relations in the postal service. Thus the Appellants cannot be sustained in their argument that what was said was privileged under the common interest exception to libel and slander.

While a union can within limits collectively persuade and use social pressure to induce nonmembers to join, it must not be given *carte blanche* permission to engage in the making of false, abusive, insulting, and defamatory statements all in the name of persua-

sion. Organizational activity must carry with it responsibility to treat individuals in a nonlibelous manner.

The Union Appellants would have this Court believe that the attack on the plaintiff Appellees was not directed at them specifically as individuals. However, the description of a "scab" in derogatory and vile terms preceeded a list of individuals to which this description applied and of which the plaintiff Appellees were a part.

2. The First and Fourteenth Amendments have never protected defamation.

This Court has said that:

The First and Fourteen Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. *Cohen v. California*, 403 U.S. 15, 19, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284, 291 (1971).

The right to the enjoyment of private reputation, unassailed, is of ancient origin and necessary to human society, and the constitutional guarantees of freedom of speech and of the press do not establish an exemption from the common-law liability for libel and slander. *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950); *Caldwell v. Crowell-Collier Publishing Co.*, 161 F.2d 333 (5th Cir. 1947), *cert. den'd* 332 U.S. 766, 68 S.Ct. 74, 92 L.Ed. 351 (1947). *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), *reh. den'd* 343 U.S. 988, 72 S.Ct. 1070, 96 L.Ed. 1375 (1952), stands as authority for the proposition that these guarantees do not render void statutes enacted for the purpose of defining and punish-

ing libel and slander as torts or crimes. Also see *Porter v. Kimzey*, 309 F.Supp. 993 (N.D. Ga. 1970), *aff'd* 401 U.S. 985, 91 S.Ct. 1237, 29 L.Ed.2d 525 (1971) and *Trimble v. Johnston*, 173 F.Supp. 651 (D.D.C. 1959).

In *Maryland Drydock, supra*, the Company refused to permit the union to distribute defamatory literature. The court said:

Counsel for the Board argued that the action of the company was an abridgement of the freedom of speech guaranteed by the Act; but we regard this contention as so utterly lacking in merit as hardly to warrant consideration. *Freedom of speech nowhere means freedom to publish libelous and defamatory matter and nowhere does it mean freedom to wantonly lampoon or insult anyone.* 183 F.2d at 541 (emphasis added).

The protective cloak of the constitutional freedoms of speech and press is limited in its scope. It cannot be claimed that under these freedoms there is a right to publish, or any individual is free to utter, libels and slanders. *Beauharnais v. Illinois, supra*; *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897); and *Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S.E. 472 (Va. 1912).

The freedom of speech and of the press does not permit the publication of libelous, blasphemous, or indecent articles, or other publications injurious to public morals or private reputation. *Robertson v. Baldwin, supra*. The situation with public officials however is somewhat different as regards the imposition of sanctions upon expressions critical of the official conduct of

such public officials such as was present in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).³ Appellees are not public officials or public figures, and their situation is not one of public or general interest.

The constitutional right of free speech is not violated by a state statute which makes it a crime to address any offensive, derisive, or annoying word to any person lawfully in a public place or to call him by any offensive or derisive name, when the statute is construed by the state courts as forbidding only such words as have a direct tendency to cause acts of violence by the person to whom they are addressed and application of such a statute to one who calls another a "damn racketeer," and "damn fascist," does not substantially infringe upon the constitutional right of free speech. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Citing *Cantwell v. Connecticut*, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 1221 (1940) this Court in *Chaplinsky v. New Hampshire* said:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been

³ This Court expanded the *New York Times* standard to "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) and to matters of "public or general interest" in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.* 315 U.S. at 571-572, 62 S.Ct. at 769, 86 L.Ed. at 1035 (Emphasis added).

While *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) permits and authorizes the dissemination of information concerning the facts of a labor dispute and includes them within the area of free discussion that is guaranteed by the Constitution, in no way did this Court, as suggested by the Appellants, authorize and permit the insulting and abuse of an individual who disagreed with the speaker. This case involved picketing and an Alabama statute unconstitutional on the basis that it violated the free speech First Amendment right granted by the Constitution. Picketing to inform the public of a given situation between employees and their employer is a far cry from making and publishing vile accusations about a fellow employee with whom the makers of such accusations disagree.

B. Virginia Statute Is a Defamation-Statute.

Section 8-630, Code of Virginia Annotated (1950) provides:

All words which from their usual construction and common acceptance are construed as insults and tending to violence and breach of the peace shall be actionable.

The United States District Court in *Marsh v. Commercial and Savings Bank of Winchester, Virginia*, 265 F. Supp. 614 (W.D. Va. 1967) cited *Carwile v. Richmond Newspapers*, 196 Va. 1, 82 S.E.2d 588 (1954) as authoritative in construing the Virginia Insulting Words Statute. In that case the Virginia Supreme Court of Appeals said that an action under this statute is treated precisely as an action for slander or libel, for words actionable *per se*, with one exception, namely, no publication is necessary. The trial for an action for insulting words is completely assimilated to the common law action for libel or slander and from the standpoint of the Virginia law it is an action for libel or slander. See also *O'Neil v. Edmonds*, 157 F. Supp. 649 (E.D. Va. 1958) (dictum).

The Virginia court said in *Peoples Life Insurance of Washington, D.C. v. Talley*, 166 Va. 464, 186 S.E. 42 (1936):

It is well recognized that, when the words complained of are uttered upon an occasion of qualified privilege, then in order to recover, it must appear from the evidence that the language used was disproportioned in strength and violence to the occasion, or went beyond the exigency of the occasion, or that the occasion was abused to gratify the ill-will of the defendant; in other words, that the defendant was acting from actual malice. 186 S.E. at 44.

The Virginia Insulting Words Statute confines that class of words which are insulting to those which are so classified by their "usual construction and common acceptance." Appellants have compared a Georgia statute recently declared unconstitutional with the Virginia Statute in question. The Georgia Statute de-

clared unconstitutional in *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L.Ed.2d 408 (1972) was first of all a criminal statute which as such must be strictly construed and secondly it did not set forth a determining criteria as the Virginia Statute does. The insulting words under the Virginia Statute would be "fighting words" determined to be actionable in *Chaplinsky v. New Hampshire*, *supra*. Furthermore, in *Gooding*, the Georgia court had never put any limits on the language to be included within the statute but the Virginia courts have determined the language which is actionable to be that which would be actionable as libel and slander and they have continuously and uniformly applied this criteria in actions brought under this statute.

Mr. Chief Justice Burger and Mr. Justice Blackmun pointed out in their dissent in *Gooding* that the majority based its opinion on the lack of qualifying criteria by the Georgia courts. This can not be the case with the Virginia statute because it has been narrowly defined by the courts of that state.

Although the Virginia Insulting Words Statute does not enumerate which words are actionable under the statute, it leaves to a jury to decide which words from their usual construction and common acceptance are in fact and can be construed as insults tending to violence and breach of the peace. The matter is thus left for determination under the accepted standards of the community, much the same as would be the case with an obscenity standard.

Recent criteria on obscenity set by this Court in *Miller v. California*, U.S. , 93 S.Ct. 2607, L.Ed.2d , 41 L.W. 4925 (1973), and the other

companion pornography cases, extended the definition of obscenity and pornography permitting a jury or judge deciding an obscenity case to apply the standards of the community involved. The Court in *Miller* said:

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the Trial Court's charge that the jury consider state community standards, are constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact.

* * *

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. 93 S.Ct. at 2619, 41 L.W. at 4930.

Appellants argue that the Insulting Words Statute is unconstitutional for vagueness. But as this Court said in *Civil Service Commission v. Letter Carriers*, U.S. , 93 S.Ct. 2880, 2897, L.Ed.2d , 41 L.W. 5122, 5131 (1973), "there are limitations in the English language with respect to being both specific and manageably brief" and the statute "is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." The standards, which are set by the statute and which must be considered by a jury or judge, are community standards as to what is insulting, defamatory language.

The jury instructions in the case at hand certainly fall within this criteria.⁴

With the obscenity cases, there were regulatory statutes, whereby the state prohibited the distribution of obscene materials and defined what is obscene by use of a community standard. The state in effect policed and patrolled the area of what is obscenity. With the Insulting Words Statute, the only state action that one can find is the granting of a civil action for use of words or insults tending toward violence and breach of the peace and the granting of access to the state courts for a remedy for use of such words. The state in no way performs a regulatory function as it does with the pornography statutes.

The Insulting Words Statute merely gives one individual the right to bring a civil action against another individual for the use of insults against the offended person, insults tending toward violence and breach of the peace. Then a jury of reasonable men must determine the usual construction and common acceptance of the words and then must decide if the words used did in fact tend toward violence and breach of the peace.

The Insulting Words Statute in question has been defined within sufficiently clear limits to meet constitutional requirements under *Chaplinsky, supra* and *Gooding, supra*, and the court or a jury has guidelines to follow.

⁴ Jury Instruction No. 4, paragraphs three and four.

"The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace.

"In determining whether or not the language complained of is

III

**THE CIRCUMSTANCES IN THIS CASE CLEARLY SHOW THAT
THE NEW YORK TIMES STANDARD IS NOT APPLICABLE.**

The Virginia Supreme Court of Appeals squarely faced the decision in *New York Times*, which requires knowledge or reckless disregard of the falsity of a publication. That court correctly held that the *New York Times* standard was not applicable to the case at bar. In view of the *Linn* case, this holding was unquestionably correct.

Appellants have misunderstood *Linn* and have failed to present that case in its proper context. It should be noted that *Linn* involved a recurrent controversy over the extent to which the Labor Management Relations Act supersedes state law with respect to libels published during labor disputes. *Linn*, 383 U.S. at 57, 86 S.Ct. at 660, 15 L.Ed.2d at 57. Furthermore, it is obvious that the kind of "labor dispute" involved in *Linn* was a dispute between labor and management, which arguably came within the coverage of the Labor Management Relations Act. In this context, this Court said:

It is therefore necessary to determine whether libel actions in such circumstances might transgress upon the National Labor policy. 383 U.S. at 58, 86 S.Ct. at 661, 15 L.Ed.2d at 582.

The *Linn* Court further said that the state courts would have jurisdiction to apply state remedies in a li-

insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual construction and common acceptance under the circumstances of this case, that is, in a labor dispute."

bel action where it was proved that the statements were made with malice and that the defamed individual was injured by them. The Court also emphasized that malicious libel enjoys no constitutional protection "in any context." 383 U.S. at 63, 86 S.Ct. at 663, 15 L.Ed2d at 590.

The *Linn* Court pointed out that the threat of state libel suits would not damage or infringe free discussion in labor disputes, as the union had insisted. This Court did however recognize that any possible conflict between national labor policy and the legitimate state interests in preventing libel must be minimized. This Court continued:

We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption. Construing the Act to permit recovery of damage in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions, and unwarranted intrusion upon free discussion envisioned by the Act. 383 U.S. at 64-65, 86 S.Ct. at 669, 15 L.Ed.2d at 591 (emphasis added).

Based on this somewhat ambiguous language, Appellants claim that even though states can now take jurisdiction over libel actions occurring in labor disputes, the *New York Times* standard of malice was

adopted "by analogy" in every such libel case. There are several reasons why this interpretation is completely erroneous. First, the internal consistency of the case does not permit this interpretation. The whole purpose and thrust of *Linn* was to settle the issue of whether or not state libel laws cover situations where defamatory language had been used in a labor dispute. This Court specifically held that state courts have jurisdiction if the plaintiff shows malice and damage.

The ambiguous statement quoted above is consistent with *Linn's* holding that state libel laws (including standards for malice) apply in the context of labor disputes. This Court, in effect, said that in this particular case, because of a dispute between the general manager of the Pinkerton Detective Agency and the union, the *New York Times* standard of malice will be applied "by analogy, rather than under constitutional compulsion." (Emphasis added) *Linn* 383 U.S. at 65, 86 S.Ct. at 664, 15 L.Ed.2d at 591.⁵ The ambiguity lies in determining what is meant by "analogy." Since an analogy is simply a comparison, it must be assumed that the *New York Times* standard was adopted in *Linn* because of comparable policy considerations with the *New York Times* case itself. The unique facts in *Linn* make this proper.

The defamatory language in *Linn* took place in the context of a classical "labor dispute." *Linn* was the employer, the libeler was the union, and they were engaged in a heated organizational campaign. It must be emphasized that not every controversy is a "labor dispute." "The mark of a labor dispute is the pres-

⁵ Appellants neglected to cite this Court to the emphasized portion of this quote. (Appellants' Brief, pages 14, 16).

ence of economic adversaries", *Sachs v. Local 48, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*, 454 F.2d 879 (4th Cir. 1972). The controversy usually involves the terms or conditions of employment. *NLRB v. International Longshoremen's Association*, 332 F.2d 992 (4th Cir. 1964). The relationship of employer to employee is generally present in a labor dispute. *Wojcik v. Ming*, 186 N.Y.S.2d 937 (App. Div. 1959).

The case at bar involves a labor dispute only in the loosest sense of the word, and it is much more closely related to a fist fight between employees in the plant than to a dispute between the employer and the employees. Because the *Linn* case was decided in the context of a labor-management confrontation, it is much more "analogous" to the *New York Times* situation than is the case at bar. Furthermore, Mr. Linn himself was much closer to being a public figure, as required by *New York Times*, than are the plaintiffs in this case.⁶ Under these circumstances, it is clear that the *New York Times* standard can be applied by analogy. However, in the case at bar, the plaintiffs are not in the relationship of labor-management, and do not even approach being public figures. Thus there is no reason to apply the *New York Times* standard by analogy.

Under *Linn* the states have jurisdiction over common law libel actions even though the libelous statements occurred in the context of a labor dispute. If

⁶ Mr. Linn was the general manager of a very large national detective agency which provided plant guards to many manufacturing firms throughout the Chicago area.

there are policy reasons such as the presence of a public official, public figure, or issue of general public interest, or anything analogous to this, then the *New York Times* standard of malice must be used. However, in the absence of a case in the *New York Times* context, the common law standard of malice may be used since there is no "constitutional compulsion" to use the *New York Times* standard.

Appellants would have us believe that the common law malice test gives insufficient breathing room to First Amendment rights. Appellants further cite many cases for the principle that dissemination of information in a labor dispute is within the area of free discussion guaranteed by the First Amendment but the cases cited do not deal with the issues involved in this case. (Appellants' Brief, page 18). No assertion has been made that labor organizations are not free to disseminate information among their members, or identify nonmembers with the motive of organizing them. *Thornhill v. Alabama*, *supra*; *Senn v. Tile Layers Union*, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937); and *Cafeteria Union v. Angelos*, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943). However, it is an absurdity for Appellants to contend that this definition of scab, which contains direct, libelous assertions about plaintiffs' character, is merely the "identification of eligible workers" for union membership. The real issue in this case, as discussed above, is whether or not plaintiffs have been defamed by the union's statement that they were unprincipled, without character, and traitors to their country, family, and fellow working man.

There are other reasons why the *New York Times* standard should not apply across the board to state

libel actions. If the *New York Times* standard was uniformly applied in all libel actions arising out of labor disputes, it would effectively and completely extinguish defamation actions. The *New York Times* standard is extremely difficult to prove since it requires that the publication be either knowingly false when made, or made with a reckless disregard for the falsity thereof. It is clear that the *New York Times* standard was established only to protect a very important value, namely free and robust public debate.

Since *New York Times*, there have been very few cases where public officials or public figures have been able to prove libel. Applying the *New York Times* standard of malice to labor disputes where non-public individuals are involved would bring about the same effect. The whole purpose of libel statutes is to give citizens a chance to redress a unique kind of wrong, i.e. damage to their reputation.

The facts of the case at bar clearly show the wisdom of a policy allowing state libel actions based on a local standard of malice.⁷ It is easy to see how violence would have inevitably developed where tension was building as a result of libelous publications.

⁷ Plaintiff Austin testified that he became very angry upon being called a scab by the union steward; and also testified that the publication of the definition of scab in this case caused not only personal tension to him, but also an atmosphere of tension with his fellow employees. (Tr. 97, 98, 102). Austin also intimated that he almost took a poke at the union steward but had been "fortunate to be able to restrain myself at that time." (Tr. 117).

IV.

SHOULD THIS COURT FIND THAT THE NEW YORK TIMES STANDARD OF MALICE DOES APPLY, THE DECISION SHOULD NOT BE REVERSED BECAUSE THE NEW YORK TIMES MALICE DEFINITION HAS BEEN SATISFIED.

If this Court should find that the *New York Times* standard is applicable, the facts of the case will show that the libelous statement in question was published with reckless disregard for the truth thereof, thus meeting this standard.

Appellants contend that the *New York Times* case makes "falsehood" the *sine qua non* of recovery for libel in the context of a "public controversy."⁸ Appellants further state that the publication at issue here imports but one statement of fact, that plaintiffs were willful nonmembers of the union, and that the rest is non-libelous hyperbole, which cannot be taken as an assertion of truth.

A cursory reading of the publication in question indicates clearly that it consists of both hyperbole and bald assertions which on their face are so irresponsible that it can hardly be contended that they were not made with a reckless disregard for the truthfulness thereof.

Even if most of the statement in question is in fact hyperbole and thus under many circumstances, protected by the First Amendment, sandwiched in the hy-

⁸ Appellant fails to explain how this situation suddenly is a "public controversy" when the issue is whether or not the *New York Times* standard applies, but was earlier a non-public matter when talking about the issue of qualified privilege. (Appellants' Brief, pages 20, 21 & 25).

perbole are accusations that the Appellees are without character, without principles, and traitors to their family, their country, and their fellow working man. There is no bitter organizing campaign or other circumstance which could possibly justify the use of such language. In this case, the names of the plaintiffs, labeled as scabs, were printed immediately following the libelous definition of a scab. On the basis of the evidence presented, the jury properly found that the publication in question has maliciously cast three low ranking postal employees into a bad light with many of their fellow employees, as well as the wives, family, and friends of those employees.

The fact that this publication was printed in conjunction with the names of the plaintiffs takes on added significance in view of the testimony of Mr. Kenneth Fiester, President of the International Labor Press Association, AFL-CIO. Mr. Fiester said that he had been involved in the labor movement for about forty years, and had seen this publication so often that he could not even begin to count the times. (Tr. 170) Mr. Fiester then stated on cross examination that he had never seen this article appear with names of specific individuals. (Tr. 173). The obvious conclusion is that this publication cannot be regarded as a mere hyperbolic venting of emotion, but as a malicious attempt to label these particular plaintiffs with the assertions contained in the publication.

Appellants also contend that because the statement in question is couched in hyperbolic terms, no reasonable man could believe that any of the statements made therein are true. It has already been pointed out that

there are several assertions in this publication which could quite easily be considered as true by the average reader, and which are not hyperbolic terms. In effect, Appellants are saying that what cannot be said directly because of libel, can always be said in hyperbolic terms thus escaping the proscription of libel. This view cannot be rationally supported.

Since there is absolutely no truth to the assertions in the publication in question and since the statement was recklessly made without regard to the truthfulness thereof, the *New York Times* standard has been met. Thus, there are no grounds for reversal even if this Court should find that the Virginia Supreme Court of Appeals incorrectly failed to apply the *New York Times* standard of malice. This Court has often held that where a decision below is correct, it must be affirmed although the lower court relied upon incorrect grounds or gave a wrong reason. *J. E. Riley Inv. Co. v. C.I.R.*, 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36 (1940); *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943); *Daniels v. Allen*, 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953).

CONCLUSION

For the reasons stated herein, the Virginia Insulting Words Statute should be held constitutional and the decision and judgments below should be affirmed. Justice and sound labor policy dictate this result.

Respectfully submitted,

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August, 1973

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL. v. AUSTIN ET AL.

APPEAL FROM SUPREME COURT OF VIRGINIA

No. 72-1180. Argued November 14, 1973—

Decided June 25, 1974

As part of its ongoing efforts to organize the remainder of letter carriers, appellant union, the carriers' collective-bargaining representative in Richmond, Virginia, published a "List of Scabs" in its newsletter, including the names of appellees, together with a pejorative definition of "scab" using words like "traitor." Appellees brought libel actions. Though recognizing that the case involved the publications of a labor union that were relevant to the union's organizational campaign, the trial court overruled appellants' motions to dismiss based on the ground that the publication had First Amendment and federal labor law protection. The court interpreted *Linn v. Plant Guard Workers*, 383 U. S. 53, to permit application of state libel laws as long as the challenged statements were made with "actual malice," defined as being "actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff . . . or . . . with such gross indifference and recklessness as to amount to a wanton or wilful disregard of the rights of the plaintiff." The jury awarded appellees damages, and the State Supreme Court affirmed. *Held*:

1. Although *Linn v. Plant Guard Workers*, *supra*, held that federal labor law does not completely pre-empt the application of state laws to libels published during labor disputes, that decision recognized that federal law does pre-empt state law to the extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or reckless disregard of the truth. Pp. 5-8.

Syllabus

2. Federal labor laws favor uninhibited, robust, and wide-open debate in labor disputes. Pp. 8-15.

(a) The relevant law here is Executive Order 11491, governing labor relations in federal employment. The basic provisions of the Executive Order are like those of the National Labor Relations Act, and similarly afford wide latitude for union freedom of speech. The partial pre-emption of *Linn* is thus equally applicable here. Pp. 8-14.

(b) The free speech protections afforded union organizing efforts extend to post-recognition organizing activity to the same degree as to pre-recognition activity. Pp. 14-15.

3. The trial court's instruction defining malice in common-law terms was erroneous and reflected a misunderstanding of *Linn*, which adopted the reckless-or-knowing-falsehood test of *New York Times Co. v. Sullivan*, 376 U. S. 254. Pp. 16-17.

4. The state libel award arising out of the publication of the union newsletter here did not comport with the protection for freedom of speech in labor disputes recognized in *Linn*. The use of the epithet "scab," which was literally and factually true and is common parlance in labor disputes, was protected under federal law. Publication of the pejorative definition was likewise not actionable, since the use of words like "traitor" cannot be construed as representations of fact and their use in a figurative sense to manifest the union's strong disagreement with the views of workers opposing unionization is also protected by federal law. Cf. *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U. S. 6. Pp. 17-22.

213 Va. 377, 192 S. E. 2d 737, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-1180

Old Dominion Branch No. 496,
National Association of Letter
Carriers, AFL-CIO,
et al., Appellants,
v.

Henry M. Austin et al.

On Appeal from the
Supreme Court of
Virginia.

[June 25, 1974]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves three state libel judgments imposing liability of \$165,000 on a labor union as a result of statements made in a union newsletter during a continuing organizational drive. The question presented is whether these libel judgments can be squared with the freedom of speech in labor disputes guaranteed under federal law.

I

Appellant Old Dominion Branch No. 496 is a local union affiliated with the appellant National Association of Letter Carriers, AFL-CIO. At all times relevant to this case, the Branch was recognized by postal authorities as the exclusive local collective-bargaining representative of letter carriers in the Richmond, Virginia area in accordance with § 10 of Executive Order 11491,¹ govern-

¹ 34 Fed. Reg. 17605 (1969), 3 CFR 861 (1966-1970 Compilation), as amended, 3 CFR 254 (1974). The Executive Order was promulgated on October 29, 1969, and became effective on January 1, 1970. It remains in effect with respect to most employees in the Executive Branch today. Postal employees, however, are no

ing labor-management relations in the Executive Branch of the Federal Government. Appellees, Henry M. Austin, L. D. Brown, and Roy P. Ziegegeist, were letter carriers in Richmond who neither were members of the Union nor paid any dues or fees to the Union.²

Although it had already been selected as bargaining representative by a majority of the postal workers in the unit, the Branch in the spring of 1970 was engaged in an ongoing effort to organize the remainder of the letter carriers. As part of this campaign, the Branch periodically published in its monthly newsletter, the Carrier's Corner, a list of those who had not yet joined the Union, under the heading "List of Scabs." After his name twice appeared in the "List of Scabs," appellee Austin complained to the Richmond Postmaster and the President of the Branch that the Union was trying to coerce him into joining. Austin said that he did not

longer covered by the Executive Order. The Postal Reorganization Act of 1970, 84 Stat. 719, converted the cabinet-level Post Office Department into the U. S. Postal Service, an "independent establishment of the executive branch," 39 U. S. C. § 201 (1970). As part of this reorganization, labor-management relations in the Postal Service were largely placed under the regulation of the National Labor Relations Act and the NLRB, effective July 1, 1971. See 39 U. S. C. §§ 1201-1209 (1970). While the Branch apparently remains the exclusive bargaining representative for letter carriers in Richmond under the Postal Reorganization Act, this case arose during the brief period when the Executive Order was controlling.

² Section 12 (c) of the Executive Order provides that

"nothing in the agreement [between an agency and a labor organization] shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization"

The Postal Reorganization Act continues this prohibition of union security agreements, 39 U. S. C. § 1209 (c) (1970). The NLRA, of course, permits certain union security agreements, § 8 (a) (3), except insofar as they may violate state law, § 14 (b). See *Retail Clerks Local 1625 v. Schermerhorn*, 375 U. S. 96 (1963).

know what a scab was, but that he was going to sue the Union if he were called a scab again.

Several weeks later, the June issue of the Carrier's Corner was distributed to Branch members. Once again the newsletter contained a "List of Scabs," including the names of the three appellees, as well as 12 others. Just above the list of names, the newsletter noted that "[s]ome co-workers are in a quandry as to what a scab is" and said "we submit the following." There followed a well-known piece of trade union literature, generally attributed to author Jack London, which purported to supply a definition:

"The Scab

"After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*.

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class."

Appellees filed these defamation actions against the Branch and the National Association shortly after the June newsletter was published.² Appellants sought dismissal of the actions on the ground that the publication was protected speech under the First Amendment and under federal labor law. The trial judge recognized that this case involved the "publications of a labor union which [were] relevant to and in the course of a campaign to organize federal employees." Nevertheless, he overruled the demurrers, interpreting this Court's decision in *Linn v. Plant Guard Workers Local 114*, 383 U. S. 53 (1966), to permit application of state libel laws in such circumstances as long as the statements were made with "actual malice." The judge defined "actual malice" in his instructions to the jury as follows:

"The term 'actual malice' is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and

² These actions are actually based on Virginia's "insulting words" statute, Va. Code Ann. § 8-630 (1957), which provides:

"All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."

However, the Virginia courts have held that "[a]n action for insulting words under Code, § 8-630 is treated precisely as an action for slander or libel, for words actionable *per se*" with one exception not relevant here. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 6, 82 S. E. 2d 588, 591 (1954). See *Letter Carriers Branch 496 v. Austin*, 213 Va. 377, 381, 192 S. E. 2d 737, 740 (1972).

recklessness as to amount to a wanton or wilful disregard of the rights of the plaintiff."

The jury returned a verdict awarding each of the appellees \$10,000 in compensatory damages and \$45,000 in punitive damages.*

The Supreme Court of Virginia affirmed. *Letter Carriers Branch 496 v. Austin*, 213 Va. 377, 192 S. E. 2d 737 (1972). In view of appellants' substantial claims that their statements in the newsletter were protected expression under the First Amendment and federal labor law, and that the state courts had erred in interpreting the pre-emptive effect of *Linn*, we noted probable jurisdiction and set this case for oral argument with No. 72-617, *Gertz v. Robert Welch, Inc.*, ante. 412 U. S. 917 (1973). We reverse.

II

As noted, this case calls upon us to determine the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a basic tenet of federal labor policy. We do not approach this problem, however, with a clean slate. The Court has already performed the difficult task of reconciling the competing state and federal interests involved in this area, and established the framework for our analysis here, in *Linn v. Plant Guard Workers Local 114*, 383 U. S. 53 (1966).

In *Linn*, an assistant general manager of Pinkerton's Detective Agency brought suit under state libel laws against the Plant Guard Workers in a diversity action in federal court. Linn alleged that statements made in a

* At least one suit brought by one of the other 12 letter carriers whose names were listed in the June newsletter has been held in abeyance pending the outcome of this appeal. The potential damage liability growing out of this publication is thus greater even than the \$165,000 which has already been awarded.

union leaflet during a campaign to organize the company's employees, which charged him with "lying" to the employees and "robbing" them of pay increases, were false and defamatory. The District Court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject matter of the complaint, finding that the union's conduct would arguably be an unfair labor practice under § 8 (b) of the National Labor Relations Act, as amended, and that the Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), therefore compelled dismissal on pre-emption grounds. The Court of Appeals affirmed.

A bare majority of this Court disagreed, however, and held that the NLRA did not completely pre-empt the application of state laws to libels published during labor disputes. The Court found that the exercise of state jurisdiction over such defamation actions would be a "merely peripheral concern" of the federal labor laws, within the meaning of *Garmon*, as long as appropriate substantive limitations were imposed to insure that the freedom of speech guaranteed by federal law was protected. Further, the Court recognized an "'overriding state interest' in protecting its residents from malicious libels." Mr. Justice Clark, writing the opinion for the Court, also pointed out that application of state law to libels occurring during labor disputes would not significantly interfere with the NLRB's role in considering arguable contemporaneous violations of the Act. As he observed, the Board has different substantive interests than state libel law, being concerned with the coercive or misleading nature of the statements, rather than their defamatory quality. And the NLRA and state laws provide quite different remedies: only state law can provide damages to compensate the libel victim; only the

Board can order a new representation election if the libel is found to have substantially affected the outcome of an election.

On the other hand, the Court recognized the danger that unrestricted libel actions under state law could easily interfere with federal labor policy. The Court observed that

"Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation elections are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." 383 U. S., at 58.

This freewheeling use of the written and spoken word, we found, has been expressly fostered by Congress and approved by the NLRB. Thus, Mr. Justice Clark acknowledged that there was "a congressional intent to encourage free debate on issues dividing labor and management," 383 U. S., at 62, and noted that "the Board has given frequent consideration to the type of statements circulated during labor controversies, and . . . it has allowed wide latitude to the competing parties." *Id.*, at 60.

The Court therefore found it necessary to impose substantive restrictions on the state libel laws to be applied to defamatory statements in labor disputes in order to prevent "unwarranted intrusion upon free discussion envisioned by the Act." *Id.*, at 65. The Court looked to the NLRB's decisions, and found that "although the Board tolerates intemperate, abusive and inaccurate

statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false." *Id.*, at 61. The Court therefore found it appropriate to adopt by analogy the standards of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). Accordingly, we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth.

III

In this case, of course, the relevant federal law is Executive Order 11491 rather than the NLRA. Nevertheless, we think that the same federal policies favoring uninhibited, robust and wide-open debate in labor disputes are applicable here, and that the same accommodation of conflicting federal and state interests necessarily follows.³

³ The Executive Order is plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch. *American Federation of Government Employees v. Hampton*, 77 L. R. R. M. 2977 (DC 1971), *aff'd sub nom. Wolkomir v. Federal Labor Relations Council*, — U. S. App. D. C. —, 79 L. R. R. M. 2634 (1971), cert. denied, 405 U. S. 920 (1972); *Manhattan-Bronx Postal Union v. Gronowski*, — U. S. App. D. C. —, 350 F. 2d 451 (1965), cert. denied, 382 U. S. 978 (1966); cf. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548, 555 (1973). Moreover, the Executive Order finds express statutory authorization in 5 U. S. C. § 7301 (1970), which provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." In view of the substantial federal interests in effective management of the business of the National Government and exclusive control over

The basic provisions of the Executive Order establish a labor-management relations system for federal employment which is remarkably similar to the scheme of the National Labor Relations Act.⁶ Although several sig-

the conduct of federal employees, and this congressional authorization, we have no difficulty concluding that the Executive Order is valid and may create rights protected against inconsistent state laws through the Supremacy Clause. See *United States v. Pink*, 315 U. S. 203, 230-232 (1942); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635-637 (1952) (Jackson, J., concurring); *Farkas v. Texas Instrument, Inc.*, 375 F. 2d 629, 632 (CA5), cert. denied, 389 U. S. 977 (1967); *Farmer v. Philadelphia Electric Co.*, 329 F. 2d 3, 8 (CA3 1964).

*Section 1 of the Order grants federal employees "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization," as well as "to refrain from any such activity," and provides that "each employee shall be protected in the exercise of this right," much as employees in the private sector are protected by § 7 of the NLRA. Sections 19 (a) and 19 (b) of the Order define unfair labor practices of agency management and unions, respectively, which are largely taken from the prohibitions of §§ 8 (a) and 8 (b) of the NLRA. And § 10 of the Executive Order establishes a system of exclusive recognition of labor organizations chosen by a majority of the employees in an appropriate unit through representation elections by secret ballot, as under § 9 of the NLRA.

Primary responsibility for administration of this system is given to the Assistant Secretary of Labor for Labor-Management Relations, who largely performs the role of the NLRB in the private sector. Under § 6 (a) of the Order, he is empowered to make determinations of appropriate collective-bargaining units, to supervise the conduct of representation elections, and to decide complaints alleging unfair labor practices. Upon a finding of a violation of the order, § 6 (b) empowers the Assistant Secretary to order government agencies or unions to cease and desist from violations of the Order, and to take appropriate affirmative action. Appeals from decisions of the Assistant Secretary are heard by the Federal Labor Relations Council, established under § 4 of the Order, which is also given a significant policymaking function.

nificant adjustments have been made to reflect the different structure and responsibilities of the governmental employer,⁷ it is apparent that the Order adopted in large part the provisions and policies of the NLRA as its model.⁸ Indeed, one of the primary purposes of the Executive Order was to "substantially strengthen the federal labor relations system by bringing it more into line with practices in the private sector of the economy." 5 Presidential Documents 1508 (October 29, 1969) (Announcement of the signing of Executive Order 11491). Accordingly, while decisions under the NLRA may not be binding precedent under the Executive Order, the Assistant Secretary of Labor charged with administration of the Order has held that his decisions will "take into account the experience gained in the private sector under the Labor-Management Relations Act." *Charleston Naval Shipyard*, 21 BNA Govt. Empl. Rel. Rep. 4003, 4004 (A/SLMR No. 1, Nov. 3, 1970).

In light of this basic purpose, we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for union speech which has long characterized our labor relations in the private sector has been carried over under

⁷ Most notable among the departures from the NLRA are the prohibition of strikes and picketing in § 19 (b)(4) of the Executive Order and the limitation of subjects of bargaining in § 11 (b). See generally Hampton, *Federal Labor-Management Relations: A Program in Evolution*, 21 Cath. U. L. Rev. 493 (1972).

⁸ See Naumoff, *Ground Rules for Recognition under Executive Order 11491*, 22 Lab. L. J. 100 (1970); cf. Hart, *Government Labor's New Frontier through Presidential Directive*, 48 Va. L. Rev. 898, 904-905 (1962) (discussing Executive Order 10988, predecessor of the present Order).

the Executive Order. For example, one of the Regional Administrators under the Executive Order program has stated, in the context of union organizing campaigns:

"It is a cliché by now but, nonetheless, an embedded policy in our labor relations that electioneering or campaigning has a broad tolerance. We do not encourage, nor do we prohibit, the exaggeration, the dissemination of half-truth or accusation. In sum, we leave it to the employee to decide."⁹

And the Assistant Secretary has held that agency censorship of union materials, even if only to delete "slandorous" or "inflammatory" material, is unlawful interference with employee rights protected under the Order and an unfair labor practice under § 19 (a)(1). *Los Angeles Air Route Traffic Control Center, A/SLMR* No. 283, at 7 (June 30, 1973) (summarized in BNA Govt. Empl. Rel. Rep. No. 514, July 30, 1973, at A-10).

We recognize that the Executive Order does not contain any provision corresponding to § 8 (c) of the NLRA,¹⁰ relied on in part by the Court in *Linn*. But the Court recognized that this section was primarily intended "to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements." 383 U. S., at 62 n. 5 (emphasis added). A provision corresponding to § 8 (c) was apparently thought unnecessary in the Executive Order because it directs the Government, as employer, to adopt a position of neutrality con-

⁹ Naumoff, *supra*, n. 8, at 100. Compare the similar language of the Board in *Stewart-Warner Corp.*, 102 N. L. R. B. 1153, 1158 (1953), quoted in *Linn*, 383 U. S., at 60.

¹⁰ Section 8 (c) provides:

"The expression of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

cerning unionization of its employees.¹¹ "Government officials do not mount 'vote no' campaigns." Hampton, *Federal Labor-Management Relations: A Program in Evolution*, 21 Cath. U. L. Rev. 493, 502 (1972).

The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights "to form, join, or assist labor organizations."¹²

"Basic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. Indeed, even before the Norris-LaGuardia Act and the Wagner Act, this Court recognized a

¹¹ This policy of agency neutrality is derived from two parts of the Executive Order. The preamble of the Order recites that

"the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment."

And § 1 directs the head of each agency to

"take the action required to assure that employees in the agency are apprised of their rights under this section and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization."

See Hampton, *supra*, n. 7, at 501-502.

¹² In other contexts, other provisions of the NLRA may be sources of protection for union freedom of speech. For example, one such source would be the system of representation elections by secret ballot established by § 9 of the Act. Wide latitude for what is written and said in election campaigns is necessary to insure the free exchange of information and opinions, and thus to promote the informed choice by the employees needed to make the system work fairly and effectively. The same policy is applicable under the Executive Order, which establishes in § 10 a similar system of representation elections for public employees.

right of unions to 'use all lawful propaganda to enlarge their membership.' " *NLRB v. Drivers Local 639*, 362 U. S. 274, 279 (1960) (citations omitted).

Vigorous exercise of this right "to persuade other employees to join" must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact. Thus, the Board has concluded that statements of fact or opinion relevant to a union organizing campaign are protected by § 7, even if they are defamatory and prove to be erroneous, unless made with knowledge of their falsity. See, e. g., *Atlantic Towing Co.*, 75 N. L. R. B. 1169, 1171-1173 (1948). The Court in *Linn* recognized the importance of this § 7 protection, in words quite pertinent to this case:

"Likewise, in a number of cases, the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute." 383 U. S., at 60-61.

These considerations are equally applicable under the Executive Order. Section 1 of the Order guarantees federal employees these same rights.¹³

¹³Section 1 of the Executive Order does not grant federal employees the right, guaranteed by § 7 of the NLRA for employees in the private sector, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The right to attempt to persuade others to join the union, however, is derived from the rights to form, join, and assist a union, as well as from the right to engage in concerted activities. The absence of mention of a right to engage in concerted activities is obviously no more than a reflection of the fact that the Order does not permit federal employee unions to engage in strikes or picketing. The prohibition of picketing and the lack of protection

Section 7 of the NLRA and § 1 of the Executive Order also dispose of appellees' suggestion that no "labor dispute" within the meaning of *Linn* is presented on the facts of this case. It is true, as appellees point out, that there was no dispute between labor and management involved here, and that the union's organizing efforts were neither during the course of a representation election campaign nor directed towards achieving recognition. But whether *Linn*'s partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute"; rather application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

As noted, one of the primary reasons for the law's protection of union speech is to insure that union organizers are free to try to peacefully persuade other employees to join the union without inhibition or restraint. Accordingly, we think that any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity, is entitled to the protection of *Linn*. We see no reason to limit this protection to statements made during representation election campaigns. The protection of § 7 and § 1 is much broader. Indeed, *Linn* itself involved union organizing activity outside the election campaign context. We similarly reject any distinction between union organizing efforts leading to recognition and post-recognition organizing activity. Unions have a legitimate and substantial interest in

for concerted activities might be thought to indicate an intention in the Executive Order to regulate the location or form of employee speech to a somewhat greater extent than under the NLRA, but we do not perceive any intention to curtail in any way the *content* of union speech.

continuing organizational efforts after recognition. Whether the goal is merely to strengthen or preserve the union's majority, or is to achieve 100% employee membership—a particularly substantial union concern where union security agreements are not permitted, as they are not here, see n. 2, *supra*—these organizing efforts are equally entitled to the protection of § 7 and § 1.¹⁴

¹⁴ Appellees argue that, rather than being entitled to the protection of *Linn*, the union's organizing efforts here were unlawful attempts to "coerce" them into joining the union in violation of § 19 (b)(1) of the Order. But we would expect § 19 (b)(1) to be interpreted in light of the construction the Court has given the parallel provision of the NLRA, § 8 (b)(1)(A). In *NLRB v. Drivers Local 639*, 362 U. S. 274 (1960), the Court held that § 8 (b)(1)(A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof." 362 U. S., at 290. Mr. JUSTICE BRENNAN emphasized that there was no intention to restrict the use by unions of methods of peaceful persuasion, quoting Senator Taft's remarks during the debate on the Taft-Hartley Act:

"It seems to me very clear that so long as a union organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it. . . .

" . . . The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' *Id.*, at 287-288.

It is true that the Executive Order provides that a union may not "interfere with" an employee in the exercise of his right to refrain from joining the union, as well as incorporating the wording of the NLRA making it unlawful to "restrain" or "coerce" an employee. The Court in *Drivers Local 639* pointed out, however, that even the words "interfere with," which originally appeared in a draft of the Taft-Hartley Act, were intended to have a "limited application" and to reach "reprehensible practices" like violence and threats of loss of employment, but not methods of

IV

The courts below did not question the applicability of *Linn* to this case. Instead, both courts believed that *Linn* required only that the jury be instructed that it must find the defamatory statements to have been made with malice before it could impose liability. And both courts thought that instructions which defined malice in the common law sense—as “hatred, personal spite, ill will, or desire to injure”—were adequate under *Linn*.

This reflects a fundamental misunderstanding of the Court's holding in *Linn*. The *Linn* Court explicitly adopted the standards of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), and the heart of the *New York Times* test is the requirement that recovery can be permitted only if the defamatory publication was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U. S., at 280. The adoption in *Linn* of the reckless or knowing falsehood test was reiterated time and again in the Court's opinion. See 383 U. S., at 61, 63, 65.

Of course, the Court also said that recovery would be permitted if the defamatory statements were shown to have been made with malice. But the Court was obviously using “malice” in the special sense it was used in *New York Times*—as a shorthand expression of the

peaceful persuasion. *Id.*, at 286. It seems likely that the Executive Order was similarly not intended to limit union propaganda or prohibit any other method of peaceful persuasion.

In any event, appellees' contention is properly addressed to the Assistant Secretary in the first instance, through an unfair labor practice complaint, and not to this Court. Even if appellees should ultimately prove to be correct, *Linn* is still applicable here, and state libel remedies are pre-empted unless appellees can show that the publication was knowingly false or made with reckless disregard for the truth.

"knowledge of falsity or reckless disregard of the truth" standard. See *New York Times Co. v. Sullivan*, *supra*, 376 U. S., at 279-280. Instructions which permit a jury to impose liability on the basis of the defendant's hatred, spite, ill will, or desire to injure are "clearly impermissible." *Beckley Newspapers Corp. v. Hanks*, 389 U. S. 81, 82 (1967). "[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 52 n. 18 (1971). (Opinion of BRENNAN, J.). Accord, *Garrison v. Louisiana*, 379 U. S. 64, 73-74, 77-79 (1964); *Henry v. Collins*, 380 U. S. 356 (1965); *Rosenblatt v. Baer*, 383 U. S. 75, 84 (1966); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U. S. 6, 9-11 (1970). It is therefore clear that the libel judgments in this case must be reversed because of the court's erroneous instructions.

This, however, cannot be the end of our inquiry. The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law. *New York Times Co. v. Sullivan*, *supra*, 376 U. S., at 284-285; *Pickering v. Board of Education*, 391 U. S. 563, 574-575 (1968); *Greenbelt Cooperative Publishing Assn. v. Bresler*, *supra*, 398 U. S., at 11. "We must 'make an independent examination of the whole record,' *Edwards v. South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, *supra*, 376 U. S., at 285.

While this duty has been most often recognized in the context of claims that the expression involved was entitled to First Amendment protection, the same obli-

gation exists in cases involving speech claimed to be protected under the federal labor laws. This obligation, derived from the supremacy of federal labor law over inconsistent state regulation, *Hill v. Florida ex rel. Watson*, 325 U. S. 538 (1945); *Teamsters Local 24 v. Oliver*, 358 U. S. 283, 295-296 (1959), requires us to determine whether any state libel award arising out of the publication of the union newsletter involved here would be inconsistent with the protection for freedom of speech in labor disputes recognized in *Linn*.

It should be clear that the newsletter's use of the epithet "scab" was protected under federal law and cannot be the basis of a state libel judgment. Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true. One of the generally accepted definitions of "scab" is "one who refuses to join a union," Webster's Third New International Dictionary 2022 (unabridged ed. 1968), and it is undisputed that the appellees had in fact refused to join the Branch. To be sure, the word is most often used as an insult or epithet. But *Linn* recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. Indeed, the Court observed that use of this particular epithet is common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the NLRA. 383 U. S., at 60-61.

Appellees nonetheless argue that the publication here may be actionable under state law, basing their claim on the newsletter's publication of Jack London's "definition of a scab." Appellees contend that this can be read to charge them with having "rotten principles," with lacking "character," and with being "traitor[s]"; that these

charges are untrue; and that appellants knew they were untrue. The Supreme Court of Virginia upheld the damage awards here on the basis of these charges. 213 Va., at 384, 192 S. E. 2d, at 742.

We cannot agree. We believe that publication of Jack London's rhetoric is equally entitled to the protection of the federal labor laws.¹⁵ The *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of falsehood. Mr. Justice Clark put it quite bluntly: "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." 383 U. S., at 63. Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. *Gertz v. Robert Welch, Inc.*, ante, at 15-16. But, in our view, the only factual statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.

The definition's use of words like "traitor" cannot be construed as representations of fact. As the Court said long before *Linn*, in reversing a state court injunction of union picketing, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts." *Cafeteria Employees Local 302 v. Angelos*, 320 U. S. 393, 395 (1943). Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, "there is no such thing as a false idea. However pernicious an opinion may seem, we

¹⁵ In view of our conclusion that the publication here was protected under the federal labor laws, we have no occasion to consider the First Amendment arguments advanced by appellants.

depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, ante, at 15.

Appellees' claim is similar to that rejected by the Court recently in *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U. S. 6 (1970). There, petitioners had characterized the position of the respondent, a public figure, in certain negotiations as "blackmail," and he had recovered damages for libel on the theory that petitioners knew that he had committed no such criminal offense. The Court reversed, holding that this use of the word "blackmail" could not be the basis of a libel judgment under the *New York Times* standard. MR. JUSTICE STEWART, writing for the Court, reasoned:

"It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U. S., at 14 (footnote omitted).

It is similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with committing the criminal offense of treason.¹⁶ As in *Bresler*, Jack Lon-

¹⁶ On the contrary, it is apparent from the record that the basis for the libel action in this case was the use of the epithet "scab" rather than the claimed charge of treason. It was the publication

don's "definition of a scab" is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join. The Court in *Linn* recognized that such exaggerated rhetoric was commonplace in labor disputes and protected by federal law. Indeed, we note that the NLRB has held that the use of this very "definition of a scab" is permissible under federal law. *Cambria Clay Products Co.*, 106 N. L. R. B. 267, 273 (1953), enforced in pertinent part, 215 F. 2d 48 (CA6 1954). It has become a familiar piece of trade union literature; according to undisputed testimony in this case, it has been published countless times in union publications over the last 30 years or more. Permitting state libel judgments based on publication of this piece of literature would be plainly

of the "List of Scabs" which disturbed the appellees, and which moved appellee Austin to complain prior to the June publication at issue and to threaten to sue if he were called a scab again. Moreover, it appears that the only asserted damage to appellees followed from the publication of the fact that they were "scabs." Appellees testified only that their co-workers and others became hostile to them, referring to them as the "scabs" the union was talking about, and that this made them tense and nervous and caused headaches. There is no evidence that anyone took literally the use of the word "traitor" or that appellees were in any way concerned about or affected by this charge.

Nor can it be claimed that the jury's verdict is itself some indication that the charge of "traitor" was construed as a defamatory representation of fact. There is certainly nothing in the trial court's instructions which would suggest that the newsletter's use of "scab" was not the basis for the jury's verdict. The court did not instruct the jury that the use of "scab" could not be the basis for imposing liability. The court did not even instruct the jury that a true statement of fact could not be the foundation for liability. Indeed, the trial court's instruction that "insults" made with "ill will" were sufficient to impose liability fairly invited the jury to base its verdict on the newsletter's use of "scab."

inconsistent with the union's justifiable reliance on the protection of federal law.

This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact. See *Greenbelt Cooperative Publishing Assn. v. Bresler*, *supra*, 398 U. S., at 13. But in the context of this case, no such factual representation can reasonably be inferred, and the publication is protected under the federal labor laws.¹⁷ Accordingly, the judgments appealed from must be

Reversed.

¹⁷ Since we find that any libel award on the basis of this publication would be inconsistent with the protection of federal law, we need not rule on appellant's alternative argument that the damages awarded here were excessive. We think it important to again point out, however, that "in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers." *Linn*, 383 U. S., at 64. It is for this reason that the Court in *Linn* held that "[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." 383 U. S., at 65-66 (emphasis added).

SUPREME COURT OF THE UNITED STATES

No. 72-1180

Old Dominion Branch No. 496,
National Association of Letter
Carriers, AFL-CIO,
et al., Appellants,
v.
Henry M. Austin et al.

On Appeal from the
Supreme Court of
Virginia.

[June 25, 1974]

MR. JUSTICE DOUGLAS, concurring in the result.

As the Court states, this case calls upon us to determine the extent to which state libel laws may be used to penalize statements expressed in the course of a labor dispute. In this instance Virginia's libel laws were used to impose massive damages¹ upon a labor union for publicly expressing, during the heat of an organizational drive, its highly pejorative but not too surprising opinion of "scabs." I agree that this expression is protected and that the judgment below cannot stand. Unlike the Court, however, I do not view the task of reconciling the competing state and federal interests in this area as a difficult one, nor do I view the federal interest as merely a matter of federal labor policy. I think that such expression is constitutionally protected and I cannot agree that there might be situations "where the use of this writing or other similar rhetoric in a labor dispute could be actionable."

¹ The judgment in this case awarded damages of \$165,000 but the total figure might be larger since at least one other suit arising out of the same publication has been held in abeyance pending the outcome of this appeal.

I agree with the Court that federal labor policy, as manifested both in the NLRA and in Executive Order 11491, favors uninhibited, robust and wide open debate in labor disputes. I disagree with the Court, however, on the reach of that policy. I think that the pre-emptive effect of federal labor regulation is such that States are prohibited from interfering with those federally regulated relations by arming disputants in labor controversies with an arsenal of defamation laws. See *Linn v. Plant Guard Workers Local 114*, 383 U. S. 53, 69 (Fortas, J., dissenting). Though referring to this state of affairs as federal labor policy, I expressly reject any implication that the policy could be otherwise were Congress or the Executive to reassess the underlying considerations and attempt to reformulate the policy.

We said in *Thornhill v. Alabama*, 310 U. S. 88, 102, that, "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution."² Since I do

² The view has been expressed that the First Amendment should accord protection only to explicitly political speech. See Bork, *Neutral Principals and Some First Amendment Problems*, 47 Ind. L. J. 1, 20 (1971). Decisions such as *Thornhill*, however, reject any such emasculative reading of the First Amendment. As Mr. Justice Black has said: "There is nothing in the language of the First Amendment to indicate that it protects only political speech, although to provide such protection was no doubt a strong reason for the Amendment's passage." H. Black, *A Constitutional Faith*, at 46 (1968). The importance of free discussion in all areas was well perceived in this country before our constitutional scheme was formulated. In a letter sent to the inhabitants of Quebec in 1774, the Continental Congress spoke of "five great rights," stating in part: "The last right we shall mention, regards the freedom of the press. The importance of this consists, *besides the advancement of truth, science, morality, and arts in general*, in its diffusion of liberal sentiments on the administration of Government" Journal

not think that discussion is free in the constitutional sense when it subjects the speaker to the penalty of libel judgments, in my view the ability of Congress or the Executive to formulate any labor policy penalizing those who might "say naughty things during labor disputes"³ is precisely nil. I believe the Framers did all the policy-making necessary in this area when they devised the constitutional framework which binds us all. As I stated in *Gertz v. Welch*, *ante*, at —, the First Amendment would prohibit Congress from passing any libel law⁴ and the limitation on labor policy formulation is but an example of that general restriction.

If the States were not limited to the same extent as the Federal Government in restraining discussion, the pre-emptive effect of federal labor regulations would be crucial. But I have always thought that the application of the First Amendment to the States through the Fourteenth⁵ leaves the States as constitutionally impotent as the Federal Government in enforcing such restric-

of the Continental Congress, vol. I, p. 108 (1904 ed.) (emphasis added).

³ See *Linn v. Plant Guard Workers Local 114*, 383 U. S. 57, 67 (Black, J., dissenting).

⁴ See also *Rosenblatt v. Baer*, 383 U. S. 75, 90 (concurring). In explaining the constitutional history which led him to the same conclusion, Mr. Justice Black said of the Framers: "They knew what history was behind them; they were familiar with the sad and useless tragedies of countless people who had their tongues plucked out, their ears cut off or their hands chopped off, or even worse things done to them, because they dared to speak or write their opinions. They wanted to ordain in this country that the new central government should not tell the people what they should believe or say or publish." H. Black, *A Constitutional Faith*, at 46 (1968).

⁵ See, e. g., *Stromberg v. California*, 283 U. S. 359, 368-369; cases compiled in *Gertz v. Welch*, *ante*, at — n. 8 (DOUGLAS, J., dissenting).

tions. This conclusion is compelled if freedom of speech is regarded, as I think it must, as a privilege or immunity of United States citizenship within the meaning of that term in the Fourteenth Amendment rather than some ephemeral right protected against state intrusion only to the extent a majority of this Court might view as "implicit in the concept of ordered liberty."⁶ As I stated in *Gertz v. Welch*, *ante*, at —:

"[T]he Court frequently has rested state free speech and free press decisions on the Fourteenth Amendment generally rather than on the due process clause alone. The Fourteenth Amendment speaks not only of due process but also of "privileges and immunities" of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition against state abridgement than the freedoms of speech and of the press."

Since labor disputes are "within the area of free discussion that is guaranteed by the Constitution" and since in my view the States and the Federal Government are equally bound to honor that guarantee, the fate of the libel award in this case is clear. "Discussion is not free . . . within the meaning of our First Amendment if that discussion may be penalized by judgments for damages in libel actions." *Linn v. Plant Guard Workers Local 114*, 383 U. S. 53, 68 (Black, J., dissenting). The extensive damages awarded in this case well illustrate that any protection short of a complete bar to suits for defamation will be cold comfort to those who enter the arena of free discussion in labor disputes. The imaginative vituperation which is commonplace in labor strife well exceeds the "normal" level of hyperbole to which most members of the community may be accustomed. A

⁶ See *Palko v. Connecticut*, 302 U. S. 319.

jury determination in a libel suit, no matter what the standard of recovery, is as likely to be influenced by community attitudes toward unionization and the often colorful individuals involved in its promotion as by any real appreciation for the damage perceived as inflicted by any alleged falsehood.

Since I do not believe that the judgment below is consistent with either federal labor policy or with constitutionally protected free speech, I concur in its reversal.

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MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Today the Court extends the rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), to encompass every defamatory statement made in a context that falls within the majority's expansive construction of the phrase "labor dispute." Because this decision appears to allow both unions and employers to defame individual workers with little or no risk of being held accountable for doing so, I dissent.

I

Executive Order 11491 establishes for certain federal employees a legal system for labor-management relations essentially similar to that provided employees in the private sector by the National Labor Relations Act. (NLRA). The Court acknowledges that the two schemes are not identical but finds no persuasive reason to differentiate between them for the purpose of determining their pre-emptive impact on state libel law. With this much I agree.

The majority then concludes that the instant case is controlled by *Linn v. Plant Guard Workers*, 383 U. S. 53 (1966). In *Linn* the Court construed the NLRA to bar state libel judgments for defamatory statements made

in a "labor dispute" covered by the Act, unless those statements were made "with knowledge of their falsity or with reckless disregard of whether they were true or false. . . ." *Id.*, at 65. Thus the Court adopted as a rule of labor law pre-emption the constitutional standard of media liability for defamation originally enunciated for libel actions by public officials in *New York Times Co.*, *supra*, and subsequently extended to public officials in *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967). In the instant case the majority relies on the analogy to the NLRA to support its conclusion that Executive Order 11491 pre-empts the libel judgments in favor of these appellees because liability was not premised on the knowing-or-reckless falsity standard that *Linn* held applicable to defamatory statements made in a "labor dispute." I perceive no reason in law or in public policy for such a sweeping extension of *New York Times*. *Linn* is distinguishable on its facts and in its rationale, and the *New York Times* rule of knowledge of falsity or reckless disregard for the truth is therefore inapplicable to the case at hand.

Linn involved a classic confrontation between union and management locked in combat during an organizational campaign. Linn was assistant general manager of Pinkerton's National Detective Agency, Inc. Pinkerton's employees were then the subject of an organizational campaign by the United Plant Guard Workers. In the course of that effort the union published a leaflet urging Pinkerton's employees to join the union and allegedly accusing Linn of "lying" to the employees and "robbing" them of pay increases. Linn sued the union for libel, but the trial court held that the National Labor Relations Board had exclusive jurisdiction over the subject matter of the dispute. It found that Linn's complaint charged the union with conduct arguably consti-

tuting an unfair labor practice under the NLRA and that *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), therefore required dismissal of the suit.

This Court disagreed with that reasoning. It recognized an " 'overriding state interest' in protecting its residents from malicious libels . . .," 383 U. S., at 61, and noted that federal labor law does not protect individuals against injury to reputation. Even where statements actionable as libel under state law would also constitute an unfair labor practice, the Board's interest would be limited to their coercive or misleading character, and the Board would be powerless to award damages or take any other step to redress the injury to the reputation of a defamed individual. The Court therefore held that the NLRA does not wholly pre-empt state libel law, even where the subject matter of the libel action might also constitute an unfair labor practice under the Act. Even in that circumstance, the States remain free to award damages for defamatory falsehoods published with knowledge of their falsity or in reckless disregard of the truth.

The result of *Linn* is a rule of partial pre-emption. The States may award libel judgments on the basis of the knowing-or-reckless-falsity formulation but are pre-empted from allowing defamation plaintiffs to recover under any less demanding standard of liability. The level of pre-emption is defined by *New York Times Co. v. Sullivan*. But the *Linn* rule of partial pre-emption has another dimension, one that distinguishes the case at hand. That is the scope of the rule—in other words, the range of circumstances in which state libel law is partially displaced by federal labor law. This is determined by the phrase "labor dispute."

Neither the NLRA nor Executive Order 11491 defines "labor dispute." In *Linn* the Court relied on the presence of a "labor dispute" to justify partial pre-emption

of state libel law, but it did not delineate the boundaries of that concept. Indeed, the Court had no occasion to do so, for, as we have seen, *Linn* involved a prototypical organizational campaign confrontation between labor and management. Given that factual setting, the Court found a potential conflict between federal labor law and state libel law. One side or the other could use defamation actions as an unauthorized weapon in the battle for the loyalty of unorganized employees and possibly undermine the federal policies favoring uninhibited debate between union and management. The instant dispute is so far removed from the factual setting in *Linn* that the considerations supporting partial pre-emption of state libel law in that case simply do not obtain here.

Appellant union had long been recognized by the postal authorities as the exclusive collective-bargaining representative for the letter carriers in the Richmond area. Of a maximum of 435 letter carriers in the unit, all save 15 were active union members. Thus the union was solidly entrenched, with approximately 96% of the letter carriers signed up. The three appellees were among those 15 employees who elected not to join the union. There is no evidence of concerted action by these 15 letter carriers; they were acting individually, motivated by principle or personal conviction or perhaps, as appellant union alleges, by a desire not to pay dues. In any event, the three appellees had worked as letter carriers for 14, 13, and 12 years, respectively, without any sort of trouble either with the postal authorities or with their fellow employees. In fact, there is no evidence that the appellees were involved in a dispute with anyone until the union officials became displeased with appellees' exercise of their admitted right not to join the union and began to subject them to public ridicule and vilification.

The majority characterizes the union's actions as part of an ongoing organizational campaign, *ante*, at 2, and treats this situation as a "labor dispute" within the intendment of the *Linn* rule of partial pre-emption. But this is accurate only if federal labor law is sufficiently implicated to warrant pre-emption of state libel law whenever an employee declines an invitation to become a union member. Certainly, there was no dispute here between labor and management. There was also no conflict between competing labor organizations and no effort, either organized or otherwise, to encourage defection from appellant union. There was, in short, no dispute of any sort save the union's attempt to coerce appellees by scurrilous and defamatory statements to do what they had an admitted legal right not to do. Thus the union, *by its own coercive conduct*, created a "dispute," the presence of which, according to the majority, provides partial immunity from the consequences of its wrongdoing under state law.

In my view this is an unnecessary and unwise extension of *Linn*. Here there was no confrontation between powerful forces of labor and management, no clash of opposing economic interests that might warrant the attention of federal regulatory authorities, and hence no prospect whatever that reliance on state libel law might subvert the federal scheme for the fair and peaceful resolution of labor disputes. Yet the majority nevertheless holds that the state libel judgments entered below are pre-empted by federal labor law. This conclusion seems to me a needless denigration of the "overriding state interest" in compensation individuals for injury to reputation. Moreover, it leaves these appellees without effective remedy for the wrong done them. Far from representing a powerful economic interest that could fight for itself within the federally created system of individual self-government, these

appellees were defenseless individuals.* In their "dispute" with the union, appellees found themselves in that state of helpless inequality that first gave social meaning to the labor movement. And after today's decision, the individual employee's exposure to harm without effective remedy is not limited to defamation by a labor union, for presumably a corporate employer may also claim the knowing-or-reckless-falsity privilege as a bar to liability for defamatory statements concerning an employee's decision to join or remain in a union. I do not believe *Linn* can fairly be construed to warrant any such regressive result.

II

As an alternative basis for its decision, the Court concludes that appellees are prohibited from recovering because there was no libel, indeed no falsehood of any kind, in the union's publication. According to the majority, the only factual allegation contained in the article was that appellees were "scabs," as that term is used in the labor movement, and that "naming appellees as scabs was literally and factually true." *Ante*, at 18. It is true, of course, that appellees were identified by name as "scabs" in the union newsletter, but it is also true that the use of the word "scab" was explicated by a long and vituperative article appearing immediately above appellees' name. The only fair way to read this article is to substitute each appellee's name for the word "scab" whenever it appears. So construed, the plain meaning and import of this publication was that appellees lacked character, that they had "rotten principles," and that they were traitors to their God, their country, their families, and their friends. The appellant makes

*The publication was sent in the union's paper to all members and also was posted on the bulletin board. Appellees had no means to reply or defend their reputations.

no attempt to prove the truth of these accusations, contending instead that they were mere hyperbole involving no statement of fact. The majority accepts this argument, in my view erroneously.

It seems to me that the majority fails to distinguish between defamatory references to an anonymous group, class, or occupation, and a similar description of a named individual. It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter—indeed, it is libellous *per se*—to publish that lawyer Jones is a shyster or that Dr. Smith is a quack. Here the union did not merely voice its opinion of “scabs” generally; it identified these appellees by name and specifically impuned their character.

I would hold that federal law does not prohibit appellees from recovering from appellant union for injury to reputation. I would reverse and remand for a new trial in accord with our decision in *Gertz v. Welch*, — U. S. — (1974).